93-548

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM CODY KELLY, Trustee,
Petitioner,
vs.
THE STATE OF CALIFORNIA,
THE STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court's statement in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 130 (1978) that " 'taking' jurisprudence does not divide a single parcel into discrete segments" enable a public entity to "deprive a property owner of all economically beneficial or productive use" (*Lucas v. South Carolina Coastal Comm'n*, 505 U.S. __, 120 L.Ed.2d 798, 813 (1992)) of a discrete, and legally separate, parcel of land on the basis that some use is allowed on another discrete, legally separate parcel of land, merely because the parcels were earlier part of the same larger tract?

2. In determining whether a regulatory act or course of conduct has deprived a property owner of all economically beneficial and productive use, may a court:

- equate loss of value with loss of economically beneficial or productive use, and find no compensable taking when the property in question retains some residual value, even where all economically beneficial and productive use is stultified;
- employ a standard of historical cost — no matter how remote in time — rather than current fair market value, in determining diminution of value or frustration of investment-backed economic expectations in a takings analysis; or
- refuse to find a temporary taking when a regulatory scheme denies a property owner the right to build on his or her property, or use that property in some economically beneficial or productive manner presently or in the definable future, but holds out the possibility that the owner may (but again may not) at some unidentifiable time be permitted such a use? If this question is to be adjudicated on an ad hoc basis, what are the standards and criteria that control such determination?

3. Can an interstate compact (here the Tahoe Regional Planning Compact [94 Stat. 3233]) permit a public entity (here the Tahoe Regional Planning Agency) to abrogate state constitutional rights of a citizen, under the doctrine of implied preemption, in the absence of any express or implied intent of Congress justifying such abrogation?

PARTIES TO THE PROCEEDING

Plaintiff, appellant and petitioner is William Cody Kelly, Trustee, Under Trust Dated December 12, 1962,

Defendant and respondent Tahoe Regional Planning Agency (TRPA) is the interstate governmental agency empowered by the 1969 Tahoe Regional Planning Agency Compact. The State of California and the State of Nevada were dismissed as parties defendant in an August 23, 1989 pre-trial order.

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PETITION FOR WRIT OF CERTIORARI

William Cody Kelly, Trustee, Under Trust Dated December 12, 1962, respectfully seeks Certiorari to review the judgment of the Supreme Court of the State of Nevada.

OPINIONS BELOW

The July 8, 1993 opinion of the Supreme Court of the State of Nevada is published at 109 Nev. Adv. Op. 100 (Nev. 1993) and at 855 P.2d 1027, and is reproduced herein as Petitioner's Appendix at A1-20.

On August 23, 1989, the Ninth Judicial District Court of Nevada issued an order dismissing defendants State of California and State of Nevada, and granting partial summary judgment to TRPA. (App. A9-10) Following trial, the District Court issued its principal decision on July 13, 1990. (App. B1-102) Finally, on November 5, 1991, the District Court filed an Explanatory Order Concerning the Award of Costs and Uppaway Coverage (App. C1-9) and also entered its Findings of Fact, Conclusions of Law and Judgment (App. D1-42).

JURISDICTION

This is an action for deprivation of property without just compensation and in violation of due process of law and equal protection of the laws, thus invoking the Fifth and Fourteenth amendments to the United States Constitution, and the Civil Rights Act (28 U.S.C. § 1983). The judgment of the Nevada Supreme Court was entered on July 8, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty or property without due process of law . . ."

Section 8, Nevada Constitution:

> ". . . No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made, or secured . . ."

The Tahoe Regional Planning Compact (Public Law 91-148), 83 Stat. 360, created TRPA in 1969. The current (1980) version of the Compact (Public Law No. 96-551, 94 Stat. 3233) is App. E. The Compact is enacted verbatim in California Government Code sections 66800-66801 and Nevada Revised Statutes 277.190 and 277.200. The 1987, TRPA Individual Parcel Evaluation System (IPES) is reproduced verbatim, without its technical appendices, at App. F.

STATEMENT OF THE CASE

A. Petitioner William Cody Kelly Secured Permission Of Douglas County And The Tahoe Regional Planning Agency To Develop The Subject Properties For Residences

In 1966, William Cody Kelly purchased 44 acres of mostly hillside property in Glenbrook, Douglas County, Nevada, overlooking Lake Tahoe, from the heirs of prominent businessman Max C. Fleischmann. (855 P.2d. 1029;

App. A3) Mr. Kelly took title to the former Fleischmann estate as Trustee under a trust dated December 12, 1962. Mr. Kelly then sought to develop certain other parts of the Fleischmann estate as small, discrete residential parcels.[1] He retained reputable and qualified professionals to prepare a development plan that would be sensitive to environmental concerns and fully comply with applicable law.

On August 27, 1974, the Douglas County Planning Commission approved Mr. Kelly's subdivision information report. (855 P.2d 1029; App. A3) On September 24, 1974, the Douglas County Commission approved the project (39 total lots) and the appropriate tentative map, and issued an administrative permit. (855 P.2d 1029; App. A4) The project then went before the TRPA, with an extraordinary result: approval of the project (App. A3; B4)[2] followed shortly by institution of an action by TRPA in the United States District Court for the District of Nevada in an effort to annul both the County approvals and its own approval. (Civil No. R-75-130) On October 24, 1975, the District Court (Hon. Bruce R. Thompson, J.) upheld the County approval and "deemed" TRPA approval. (855 P.2d 1030; App. A3-4, B4-5) No appeal was taken, and the judgment became final.

Phase I and Phase II of the three-phases project were duly built. (855 P.2d 1029; App. A4, App. B4, B6) Phrase III consisted of lots 33 through 39 (collectively "the Properties"), sometimes referred to in the record as the "Hilltop lots" are the subject matter of this action.[3] (App. B6)

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[1] Each parcel was limited to 2,500 square feet, while the other parts of the estate were to remain common areas, and others were set aside for amenities for the residents. (App. B5) For the Court's convenience, a plat of the proposed development (Trial Exhibit 1-2) is at App. G.

[2] Approval was pursuant to the "deemed approved" provision of the 1969 Compact (Article VI(k)). How the provision resulted in a deemed approval status, is explained at 855 P.2d 1029, 1036 (App. A4).

[3] The Uppaway Development Co., incorporated in 1977, took title to most of the lots in the former Fleischmann estate, but the Properties themselves

(continued)

On December 30, 1982, Douglas County issued residential building permits for lots 33-38 (lot 39 having been left as green belt in an effort to placate TRPA), subject only to TRPA approval of the particulars of the house plans. (855 P.2d 1030; App. A6) Because each party empowered to review development of the Properties had formally given its imprimatur (TRPA as to everything but house plan particulars), that should have been the end of the matter. But it was not.

B. How The Tahoe Regional Planning Agency Stultified All Economically Beneficial And Productive Use Of The Properties For Nineteen Years (And Counting) After Douglas County, The Federal District Court And The TRPA Itself Gave Their Approval To Petitioners' Development Proposal, And For Eleven Years (And Counting) After The Issuance Of Building Permits

In the ensuing weeks and months and years, Mr. Kelly found himself beset by constantly shifting TRPA stances, (B6-7); intramural TRPA squabblings including an internal lawsuit (855 P.2d 1031; App. A7, B7); TRPA functionaries not sharing critical information with each other (see citations AOB 20); misplaced files (Ex. 1-26 and 1-33); refusals for years on end to act on applications submitted by Mr. Kelly (App. B7); passage of ordinances (81-1, Section 3.12 and 12.61) that applied **exclusively** to the Properties without notice being given to Mr. Kelly that such were being considered (Ex. 1.1); and, in August, 1983, a self-imposed TRPA moratorium (855 P.2d at 1031; App. A7, B7).

(fn. continued)
remain the property of William Cody Kelly, Trustee. (App. B14) The terms "Uppaway" and "Uppaway Estates" are used in the record, pervasively but not always precisely, to describe the larger Fleischmann parcel, the project, and improved and unimproved lots.

In spite of these events, Mr. Kelly sought conciliation rather than confrontation. He agreed not to build out lot 39 and to relocate two other lots. (35 ROA 425:8-14) He spent $169,000 on off-site improvements, including an effective infiltration system to keep runoff water out of the Lake (App. B15), in consideration of what he and others reasonably believed to be an understanding with TRPA that would permit him to proceed with full development of the Properties; but once again, there was no TRPA quid for Mr. Kelly's quo. (App. B15) Final resolution appeared impossible — even though TRPA, through its Senior Planner Gordon W. Barrett, conceded that the detailed plans for the Properties were in "substantial conformance" with the prior approvals given. (34 ROA 210:23-220:22)

TRPA's purpose in all of this, seems to have been to deprive Mr. Kelly of the benefit of the County Permits and District Court "deemed approved" judgment, and to require him to comply — as if he had no judgment at all — with all ordinances TRPA had enacted to control residential development. The first such enactment, dating from August 25, 1981, was TRPA Ordinance 81-5 (855 P.2d 1030, n.4; App. A5); 81-5 was succeeded by the Individual Parcel Evaluation System (IPES), a component of the 1987 plan. (App. B7)[4]

The court below recognized that IPES is a *de facto* growth control law which affects not only residential growth in the Tahoe basin but also "indirectly controls other facets of travel and development in the basin" as well. The Court noted that "no new subdivision lots have been approved in the basin since 1982." (App. B79)

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[4] That there was more than a modicum of cynicism in this tactic is demonstrated by the concession at trial and the subsequent holding of the trial court (see *post*) that the "deemed approved" judgment took the Properties out of the strictures imposed by IPES. The trial court was critical of TRPA for having hidden agendas (App. B68), as well as for managerial shortcomings. (App. B79)

TRPA had thus prevented residential development specifically authorized by law for nineteen years and counting. Unless Mr. Kelly is able to develop the Properties, they will remain idle without econonically beneficial or productive use. Pursuant to both the Douglas County Zoning Ordinance (Ex. 39; 35 ROA 497:16-20; 35 ROA 402) and the recorded Covenants, Conditions and Restrictions[5] the only legally permissible use of the Properties is residential.

At trial, a TPRA expert conceded — and the District Court formally found — that under the formula used to determine right to build, Mr. Kelly may never be allowed to build residences on the Properties. (App. B32, B66)

C. Procedural History

1. Before The Ninth Judicial District Court Of The State Of Nevada

On July 24, 1987 (App. B7), twelve years after the United States District Court confirmed his right to develop the Properties, and five years after he submitted detailed house plans for each of the Properties to TRPA for a lot-by-lot review of construction particulars (App. B15), Mr. Kelly sued TRPA, the State of Nevada and the State of California, in the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas. (Case No. 18325).[6] Mr. Kelly alleged claims under the United States and Nevada Constitutions, and the Federal Civil Rights Act. On August

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[5] "Residence Lots: Each residence lot shall be used as a residence for a single family, and for no other purposes." (Ex. 1-8, p. 10)

[6] The immediate trigger for the lawsuit was the June, 1986 TRPA promulgation of goals and policies classifying the Properties as unbuildable because of nonconformance to soil standards (Bailey coefficients), in spite of the fact that a primary purpose of the lot changes made by Mr. Kelly was to insure that the Properties fully conformed to soil standards. (35 ROA 434:8-17; Exs. 1-47 and 1-50)

23, 1989, the State defendants were dismissed. (App. B8)

In its decision filed July 13, 1990, the District Court (Hon. Charles M. McGee, District Judge) found that (1) while "confusing to the average person and in the grand scope of things . . . [t]he regulatory system predicated upon IPES is valid . . . ." (App. B51); (2) "[A]s long as the benefit received by the property from the ordinance is *direct* and *substantial* and the burden imposed is *proportional*, the TRPA can force landowners like Mr. Kelly to postpone their building plans for a *reasonable period* . . . ." (App. B85); (3) Mr. Kelly is not entitled to just compensation under the Fifth and Fourteenth amendments" (App. B89);[7] and (4) "only routine aspects of the 1987 plan and ordinances apply to Mr. Kelly, because Uppaway's 'deemed approved' status grandfathers land coverage allocations and because effective mitigation measures already in place cause no just reason for further impeding the buildout of his planned unit development." (App. B100)

In its later judgment, the trial court thus dismissed Mr. Kelly's Nevada constitutional claims:

> "As federal law, the regional plan adopted by the TRPA preempts state law and state constitutional provisions. Accordingly, any claims asserted by the plaintiff based upon Nevada's Constitutional provisions should be dismissed." (App. D20)

Significantly, the Court also concluded that:

(1) "It is difficult, then, if not absurd, to avoid calling the effect of the TRPA's code of ordinances on the Uppaway hilltop anything other than a temporary

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[7] In a comment critical to the thrust of this Petition, the Court stated that for purposes of determining whether Mr. Kelly is entitled to compensation, it "doesn't matter" whether Mr. Kelly lost money, recaptured his investment or did "better than that." (App. B88-89) This echoed the introductory comment (App. B10) that "not too much attention is given to testimony involving Mr. Kelly's investment decisions and realizations."

appropriation or taking for a public purpose." (App. B84) (This is a somewhat astonishing statement in view of the result reached.)

(2) "[I]t is . . . sensible and fair to force Tahoe planners and governments to honor their previous Court ordered commitments to William Kelly." (App. B101)

(3) "He [Kelly] has proven that he poses the Lake no harm." (App. B101)[8]

On November 5, 1991, the District Court awarded TPRA $241,836.69 costs and $7,500 fees (App. C1-9; D1-24) and entered judgment. (App. D1-24).

2. Before The Supreme Court Of The State Of Nevada

Both parties appealed.[9] After extensive briefing (the principal briefs totaled 368 pages), the Nevada Supreme Court issued its July 8, 1993 opinion (855 P.2d 1027; App. A1-20), in which it sustained the trial court against Mr. Kelly's challenge. The Court also stated that it did "affirm the 'deemed approved' status," but modified that holding to require Mr. Kelly to comply with all TRPA standards and regulations, including IPES. (855 P.2d at 1036-37; App. 19)[10]

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[8] The most striking thing about the District Court opinion is the Court's perception of what was before it: the future of Lake Tahoe. *See, e.g.*, App. B3, where the Court noted that its decision "impacts upon the future of the Tahoe Regional Planning Agency, and perhaps even upon the future of Lake Tahoe". This theme persisted throughout.

[9] TRPA challenged the specific relief granted Mr. Kelly under the "deemed approved" holding.

[10] The language purporting to affirm in part is illusory; it created a *de facto* reversal, leaving Mr. Kelly with a slight land coverage variance which may yet be put at risk. The Nevada Supreme Court did not point to any language in either Judge Thompson's order or Judge McGee's order

(continued)

In language pertinent to this petition, the Nevada Supreme Court held that there was no taking because the Properties retained substantial value, and that "Uppaway must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of all economic use," quoting language at *Penn Central*, 438 U.S. 130 that "[t]akings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." (855 P.2d at 1034-35; App. A15)[11] The Court affirmed without comment the trial court's dismissal of Mr. Kelly's Nevada Constitutional claims.

REASONS WHY THE WRIT SHOULD ISSUE

A. Introductory Statement

This case is not about environmental protection. And most particularly, it is not about preservation of Lake Tahoe or the Tahoe Basin. Society, through its elected and appointed officials, has the power and obligation to act responsibly and even sensitively, in dealing with natural assets such as Lake Tahoe. The ultimate question this case presents is

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justifying its interpretation of "deemed approved" nor could it. With respect, the Court below — ignoring any troublesome questions of jurisdictional cognizance — simply overruled the 18-year old final decision of the Federal District Court on an unabashedly result-oriented basis. *See* 855 P.2d 1036; App. A18-19.

[11] Curiously, in view of the irreconcilable TRPA concession and the trial court finding, the Nevada Supreme Court held that most of Mr. Kelly's lots "are expected to receive approval in the next few years," and that if the IPES lot line regulations are adjusted downward — this has never occurred, as Mr. Kelly demonstrated to the Nevada Supreme Court in evidence from TRPA minutes that the Court refused to consider (855 P.2d at 1037; App. A20) — the other lots may be built out as well. (855 P.2d 1035; App. A15-16)

whether the costs of public benefits derived from preservation are to be equitably distributed as required by the just compensation clause. *See United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

For William Cody Kelly, this case is about deliberate deprivation — without compensation — of his right to develop and beneficially use the Properties for eighteen years (with no end in sight).

This case is also about misuse of this Court's language, particularly the language from *Penn Central* quoted *ante* at p. 9, taken out of a restricting context and employed as a weapon to deprive a citizen of his constitutional rights.

Finally, this case is about the cavalier misuse of the federal preemption doctrine. The precise issue presented here — whether an interstate compact may preempt the state constitutional rights of citizens without an express or implied congressional intent to that end — is one of first impression and is of great importance to the millions of people who live in areas affected by interstate compacts. The Nevada courts gave this question short shrift, simply decreeing that the Compact automatically preempts state constitutional rights. Express congressional intent is to the contrary.

Such cursory analysis is especially troublesome here: The Compact unmistakably shows that Congress did *not* intend to preempt state constitutional claims. It provides in a severability clause that if the "Compact shall be held contrary" to the constitutions of either California or Nevada," it shall nonetheless remain "in full force and effect as to the remaining State and in full force and effect as to the State affected as to all severable matters." Art. X(a); App. E38. This language makes sense only if the Compact does not supersede or preempt state constitutional provisions.

This Court's corrective intervention is sorely needed.

B. Petitioner Has Been Deprived Of Just Compensation By A Misapplication Of The Language In *Penn Central Transportation Co. v. City Of New York* That " 'Taking' Jurisprudence Does Not Divide A Single Parcel Into Discrete Segments"; This Phrase Has Caused Considerable Confusion And Startling Injustice In Just Compensation Cases, And Needs Revisiting By This Court

1. Wrested Out Of Its Defining And Limiting Context And Treated As A Legal Doctrine For General Prospective Usage, The *Penn Central* Quotation Is Irreconcilable With The Integrated Takings Jurisprudence Of This Court

In 1978, in *Penn Central Trans. Co. v. City of New York*, 438 U.S. at 130, this Court said that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments. . . ." This phrase (hereafter the *Penn Central* quotation) has a splendid aphoristic quality, and unsurprisingly was instantly embraced by the bar representing land regulatory agencies. It has since become invested with a life of its own, as a supposed doctrinal foundation for the assertion that partial regulatory takings need not be compensated.

But there is more to sound adjudication than an advocate's ability to fasten onto a helpful phrase. Taken beyond the factual context in which it was uttered, the *Penn Central* quotation creates clear conflict with the very takings jurisprudence it invokes.[12] To use an obvious example, in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987), the taking *did* divide the subject parcel into segments: the

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12 Apart form the context, discussed presently in the text, it is also significant that the *Penn Central* quotation, aside from its own *ipse dixit*, contains no citation to any prior authority, whether to this Court's prior decisions, or otherwise. This is so for the best of reasons: no authority supporting such an unqualified proposition exists.

uncompensated *Nollan* taking was partial: (a) it was a taking of an easement (i.e., qualitatively partial), and (b) the easement area extended over only fraction of the Nollans' parcel (i.e., quantitatively partial). Still no "jurisprudence" stood in the Court's way of finding it a taking within the meaning of the Fifth Amendment (483 U.S. at 841-842).[13]

Much of this Court's taking jurisprudence — and probably most of its inverse condemnation case law — is comprised of partial taking cases.[14] Each of those cases necessarily involved the taking of a discrete "segment" of property. But whether direct or inverse, a partial taking is no less a taking,[15] and it requires compensation for the part taken, and for the diminution in value of the remainder (less, of course, any special benefits). That is long-settled hornbook eminent domain law. *United States v. Grizzard*, 219

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[13] Many years ago, Chief Justice Marshall cautioned:

> It is maxim not to be disregarded, that general expressions in every opinion, are to be taken in connection with the case in which those expressions are used. *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

These words fit this situation as if written for it.

[14] *See, e.g., Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982) (cable easement); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (temporary taking of use of money [interest]); *United States v. Security Ind. Bank*, 459 U.S. 70 (1982) (taking of security interest by discharge in bankruptcy); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (admission of public into private marina); *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (avigation easement); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialmen's liens); *Federal Power Comm'n. Niagara Mohawk Power Co.*, 347 U.S. 239 (1954) (riparian rights); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) (flooding); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (taking of use of spring freshets flowing down mountains and watering rangeland); *United States v. Dickinson*, 331 U.S. 745 (1947) (flooding easement); *United States v. Causby*, 328 U.S. 256 (1946) (avigation easement).

[15] While there are "important and legal differences between an inverse condemnation suit and a condemnation proceeding" (*United States v. Clarke*, 445 U.S. 253, 255 (1980)), apart from the government's concession of liability in an eminent domain proceeding, these differences are procedural.

U.S. 180, 184-85 (1911); *United States v. Welch*, 217 U.S. 333, 338-339 (1910); *Sharp v. United States*, 191 U.S. 341, 351-354 (1903); *Bauman v. Ross*, 167 U.S. 548, 574 (1897).

As the leading treatise puts it:

> 'All the issues relevant to an entire taking are similarly relevant to a partial taking.' [4A Nichols on Eminent Domain, § 14.01[1]. p. 14-2 (1993).]

United States v. Causby, 328 U.S. at 264 is instructive. There, the landowner sought compensation for a partial taking (of an avigation easement). The government resisted liability on the grounds that operation of its aircraft was within its regulatory powers (*id.* at 260), and argued that no compensation should be awarded unless the operation of its aircraft were so intrusive as to deny the owner *all* of the affected land. (*Id.* at 261-262) This Court disagreed:

> 'There is no material difference between the supposed case [of total deprivation] and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling.' [*Id.* at 262.][16]

Accordingly, if sought to be read literally outside its factual context, the *Penn Central* quotation finds no support in taking jurisprudence, and indeed is contrary to the basic tenet of that very jurisprudence.

How then can the *Penn Central* quotation be correct? The answer to that question lies within *Penn Central* itself. In *Penn Central*, this Court stressed that regulatory takings must be viewed on an ad hoc, case-by-case basis. (438 U.S. at 124) Though the "taking issue" has inspired much contentious polemics in recent years, that analytical approach is unremarkable, because at the very birth of regulatory taking

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[16] The Court went on to note that a partial taking by the glide path "might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field" [*id.*]. The fact that some use would remain did not make the partial taking a non-taking.

jurisprudence, Justice Holmes admonished that ". . . this is a question of degree — and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). *Mahon* itself was a partial regulatory taking (of mineral rights).

Penn Central is consistent with this doctrinal approach. The plaintiff in *Penn Central* made what turned out to be a dispositive concession, namely that in its regulated condition, the Grand Central Terminal was producing a reasonable return. (438 U.S. at 129, n.26) Thus Penn Central was unable to argue that its use and enjoyment of its property was *unreasonably* interfered with. On the contrary, Penn Central's concession led it into the unpersuasive posture of implying that it was entitled to something more than a reasonable return, or that it was entitled to exploit its property — not just reasonably, or consistently with its reasonable, investment-backed expectations — but to its *fullest* extent. This Court disagreed. (438 U.S. at 131-32, 136)[17]

Once these aspects of *Penn Central* are kept in mind, the phrasing that "takings jurisprudence does not divide a parcel into segments" and that "this Court focuses . . . both on the character of the [government] action and on the nature and extent of the interference of the parcel as a whole" (438 U.S. at 130) makes perfect contextual sense. Penn Central's concession that it was deriving a reasonable return from the Grand Central terminal resulted in a dispositive Court holding *that never reached the unnecessary inquiry of what are the taking criteria when the owner is not permitted to derive*

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[17] *Penn Central* thus adumbrated the explanation in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986) that the Takings Clause does not protect a landowner's hope of pursuing grandiose developments. Put another way, only reasonable expectations are protected by law — unreasonable ones are not.

a reasonable return from his property.[18]

This historical analysis seems to leave no doubt as to what the Court was about: retention of concededly reasonable return on the regulated property is no taking. But if one attempts to read into the *Penn Central* quotation categorical, independent doctrinal attributes, the result is confusion, and the creation of an unsound basis for overzealous arguments that a partial taking does not require compensation which it plainly has at least since 1911 when *Grizzard* was decided by this Court.

In terms of the more discrete inquiry at bench — whether the *Penn Central* quotation may be applied to vacant land, and deprive the owner of all use of a substantial part of it without compensation — the same analysis emphatically demands a "no" answer. It lends no support to the astonishing notion that by imposition of confiscatory regulations the government can simply take any part of a private landowner's holding it chooses, without any compensation whatever, as long as it does not strip the owner of everything. *See, e.g., American Sav. & Loan Ass'n v. Marin County*, 653 F.2d 364 (9th Cir. 1981); *Whitney Benefits, Inc.*

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[18] The only other case in which this Court has repeated the *Penn Central* quotation — *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) — involved a similar situation. Just as in *Penn Central*, the regulation at issue in *Keystone* allowed the owners to make a reasonable return on their property. *Keystone*, 480 U.S. at 498-499 ("petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of [their] property"). Tethered to the facts from which it arose, *Keystone* therefore likewise makes analytical sense. When removed from its precise setting, however, the *Keystone* language has produced the same analytical confusion and unfairness as the *Penn Central* quotation has. In fact, this Court suggested as much in *Lucas*, 505 U.S. at __; 120 L.Ed.2d at 813 n.7.

The *Penn Central* quotation was paraphrased in *Concrete Pipe & Products of California, Inc. v. Contruction Laborers Pension Trust for Southern California*, 508 U.S. __, 124 L.Ed.2d 539, 577-78 (1993). In this ERISA/MPPA case, however, this Court specifically stated that the *Lucas* mode of analysis, controlling here, was inappropriate. (*Id.* at 577)

v. United States, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 112 S.Ct. 406 (1991).

2. The Lower Courts Are Hopelessly Divided As To The Meaning Of The Penn Central Quotation

Just two terms ago Justice Scalia observed that "uncertainty" surrounding the meaning of the *Penn Central* quotation had fostered "inconsistent pronouncements by the Court." *Lucas*, 505 U.S. __; 120 L.Ed.2d at 813 n.7. Further, there is no consensus among the lower courts as to what it means. Further, and unhelpfully, courts typically recite the quotation like a mantra with no explicating analysis.

Illustrative cases may be divided into four general groups.

First, some cases have found that "the parcel as a whole" constitutes any property interest that state law recognizes as separate and protectible.[19] For example, in *Western Energy Co. v. Genie Land Co.*, 737 P.2d 478, 482-84 (Mont. 1987) the Montana Supreme Court held that the "parcel as a whole" consisted of a separate mineral estate that was specifically protected under state law.[20]

Second, other cases have avoided the hard-and-fast rule implied by the *Penn Central* quotation, and have instead

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[19] As the North Dakota Supreme Court put it in *Grand Forks-Trail Water Users, Inc. v. Hjelle*, 413 N.W.2d 344, 346-47 (N.D. 1987), *appeal dismissed*, 484 U.S. 1053 (1988), the *Penn Central* quotation means only that to effect a taking a regulation must do "more than regulate one particular future use of property while leaving available to the property owner all other uses . . . ."

[20] Interestingly, in *Allingham v. City Of Seattle*, 749 P.2d 160, 163 (Wash. 1988), the Washington Supreme Court applied this same analysis to hold that a Seattle "Greenbelt Ordinance," which forced plaintiffs to maintain seventy percent of their land as open space, effected a taking. Only two years later, however, *Allingham* was overruled as being inconsistent with *Penn Central*. *Presbytery Of Seattle v. King County*, 787 P.2d 907, 914-15 (Wash.), *cert. denied*, 498 U.S. 911 (1990).

determined the relevant parcel for takings purposes as a multi-faceted factual inquiry. *E.g., American Sav. & Loan*, 653 F.2d at 368-72; *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 391-93 (1988); *Florida Rock Ind., Inc. v. United States*, 791 F.2d 893, 904-05 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); *Kaiser Dev. Co. v. City And County Of Honolulu*, 649 F.Supp. 926, 947-48 (D. Haw. 1986) *aff'd* 898 F.2d 112 (9th Cir. 1990); *Twain Harte Associates, Ltd. v. County Of Tuolumne*, 217 Cal.App.3d 71, 85-88 (1990); *Aptos Seascape Corp. v. County Of Santa Cruz*, 138 Cal.App.3d 484, 495-97 (1982), *appeal dismissed*, 464 U.S. 805 (1983).

Third, still other cases have read the *Penn Central* quotation to mean that to effect a taking, a regulation must take every bit of value the property ever had. *E.g., Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1430-31 (10th Cir. 1986), *cert. denied*, 480 U.S. 961 (1987); (grazing rights on land suited only for grazing); *Furey v. City Of Sacramento*, 780 F.2d 1448, 1453 n. 4 (9th Cir. 1986) (sewer rights); *Moskow v. Commissioner Of Envtl. Management*, 427 N.E.2d 750, 752-53 (Mass. 1981); (dredging rights); *Flynn v. City of Cambridge*, 418 N.E.2d 335, 339-40 (Mass. 1981); (condo owners right to occupy own unit); *Bernardsville Quarry, Inc. v. Borough Of Bernardsville*, 608 A.2d 1377, 1388-89 (N.J. 1992) (quarry rights on land suited only for mining).

Fourth, some courts, such as the court below, have applied the *Penn Central* quotation even more broadly. These courts hold that the "parcel as a whole" constitutes *all* property the landowner has *ever* owned in a certain geographic area.[21] *E.g., Deltona Corp. v. United States*, 657 F.2d 1184, 1191 (Fed. Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); (10,000 acres originally purchased by the landowner);

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[21] This, of course, is the rule this Court described as "extreme" and "unsupportable" in discussing the lower court decision in *Penn Central* itself. *See Lucas*, 505 U.S. at ___; 120 L.Ed.2d at 813 n.7.

Jentgen v. United States, 657 F.2d 1210, 1213 (Ct. Cl. 1981) (80 acres originally purchased); *Ciampitti v. United States*, 22 Cl.Ct. 310, 319-21 (1991) (45 *non-contiguous and legally separate* acres of property); *Bevan v. Brandon Township*, 475 N.W.2d 37, 41-43 (Mich. 1991), *cert. denied*, 112 S.Ct. 941 (1992) (two legally separate lots purchased at different times).

Finally, one reading of the *Penn Central* quotation is so expansive as to defy categorization. In *Woodbury Place Partners v. City Of Woodbury*, 492 N.W.2d 258, 261 (Minn. App. 1992), *cert. denied*, 113 S.Ct. 2929 (1993), the Minnesota Court of Appeals held that *Penn Central*'s "parcel as a whole" language meant that a regulatory taking could not be found unless a regulation *permanently* took every property the owner had ever possessed. In doing so, the court explained that the "temporary taking" doctrine from *First English* was inconsistent with *Penn Central*'s language, and should be construed "narrowly," so as not to override the supposedly fundamental principle established in *Penn Central*. *Id.* at 262.[22]

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[22] Although *Woodbury Place Partners* pushes constructional whimsy almost to parody, it underscores what a fair reading of these cases in the aggregate, and indeed the entire body of land use case literature in recent years, witnesses. Courts as a rule are much more diligent in following the principle of deference to regulating entities than they are in enforcing the just compensation clause. The District Court in this case spoke of "just how far the Courts will go to protect a legislative body's police power." (App. B59) Courts sometimes seem oblivious to this Court's admonition that "it is obvious that vindication of conceded constitutional rights cannot be made dependant upon any theory that it is less expensive to deny than afford them." *Watson v. Memphis*, 373 U.S. 526, 537 (1963).

One of the byproducts of the anti-compensation movement is the demonization of developers, particularly in polemical secondary literature, as the perceived enemy of the environment. But this pejorative assault gives a distorted picture of reality, since oppressive land use regulations impact not just developers but millions of property owners of modest means as well by sharply reducing housing supplies and unsurprisingly kiting prices. The reasons that developers appear disproportionately as litigants is that they are the ones with standing, and the costs of this type of litigation

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3. Because The Penn Central Quotation, Taken Out Of Context, Virtually Guarantees That Many Landowners Will Be Treated Unfairly, It Should Be Clarified, Limited, Or Disapproved

When the *Penn Central* quotation is isolated from its defining context and pushed to extremes — as was done in many of the cases discussed above — it becomes a tool that allows government to seize land without paying the owner a single dime.

In *Deltona Corp.*, 657 F.2d at 1191, the Court of Claims held that the government could permissibly destroy the value of **2000 acres** of property without compensation, since many of the acres originally purchased retained economic value. Similarly, in *Jentgen v. United States*, 657 F.2d at 1213, the Court of Claims refused to require compensation where the regulation at issue had rendered 60 of plaintiff's 80 acres worthless. Building upon *Jentgen*, the Court of Claims held in *Ciampitti v. United States*, 22 Cl.Ct. at 319-21, that a regulation did not go "too far" even though it rendered plaintiff's 14 acres valueless, because landowner was allowed to keep 31 **non-contiguous and legally separate** acres.[23]

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are enormous. Nothing illustrates this as compellingly as the fact that Mr. Kelly thus far has paid out (or owes) over $400,000 for on and offsite improvements and TRPA costs and fees — and this figure does not include his own court costs and attorney's fees — with nothing to show for it.

Ironically, this Court's correct insistence that these cases be decided on an ad hoc basis inadvertently contributes to the problem. It makes regulators bolder and courts less accountable than they would otherwise be.

To use a phrase that has gained currency in recent years, landowners are facing a very uneven playing field. This Court's help is needed now to level it to constitutional evenhandedness.

[23] *Accord Naegele Outdoor Advertising, Inc. v. City Of Durham*, 803 F.Supp. 1068, 1073-74 (M.D.N.C. 1992) (no taking where regulation deprived property owner of 65% of business); *Elsmere Park Club Ltd. v. Town Of Elsmere*, 771 F.Supp. 646, 653 (D.Del. 1991) (no taking where regulation deprived apartment owner of ability to rent 39 out of

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Perhaps the most inequitable result occurred in *City And County Of San Francisco v. Golden Gate Heights Investments*, 14 Cal.App.4th 1203, 1209 (1993), *pet. for cert. pending* (No-93-274, Aug. 18, 1993). There, the court held in an *eminent domain* action that the City needed only to pay the landowner for five of the fourteen lots it had appropriated from him. Why? Because the *Penn Central* "parcel as a whole" language would have allowed the City to achieve the same result by simply passing a regulation that rendered the other nine lots worthless even though there was no such regulation. *Id. Golden Gate Heights* is a total negation of the just compensation clause.

4. The Nevada Supreme Court Reached Back Eighteen Years In Its Application Of The *Penn Central* Quotation, Ignoring The Intervening Creation Of Separate Lots Under Nevada Law, To Work A Striking Injustice In This Case

In its misapplication of the *Penn Central* quotation, the Nevada Supreme Court stated that "Uppaway must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of all economic use." (855 P.2d at 1035; App. A15) The problem is that what the Court was addressing is indisputably — and since at least 1975 has indisputably been — "thirty-nine individual lots," each duly created and constituted under Nevada law. *See M & R Investment Co. v. State Dept. Transp.*, 103 Nev. 445, 449, 744 P.2d 531 (1987); *Andrews v. Kingsbury Gen. Improvement*, 84 Nev. 88, 89-90, 436 P.2d 813 (1968). The Court thus aligned itself with those courts that have taken the

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approximately 200 apartments); *Tim Thompson, Inc. v. Village Of Hinsdale*, 617 N.E.2d 1227 (Ill. App. 1993) (no taking where regulation destroys one out of three parcels owned); *Goldberg v. City Of Rehoboth Beach*, 565 A.2d 936, 944-45 (Dela. Sup.), *aff'd* 567 A.2d 421 (Dela. 1989) (no taking where regulation deprived landowner of one of two contiguous lots).

extreme position (*see post*) that if separate parcels were historically part of the same larger tract, the *Penn Central* quotation somehow precludes recovery.[24]

C. The Nevada Supreme Court Decision Ignores And Distorts This Court's Directives As To When The Constitution Requires Compensation For Deprivation Of Economically Beneficial Use, In A Manner That Not Only Worked A Striking Injustice In This Case But Is Laden With Precedential Mischief

In *Lucas*, this Court noted that the "rhetorical force" of the traditional "deprivation of all economically feasible use" standard exceeds its precise usefulness. *Lucas*, 120 L.Ed.2d at 798 n.7. In view of the ad hoc method of resolution in this area, this may be inevitable. But just because black-letter standards are flexible does not mean that anything goes. This Court can profitably interdict distortions of its teachings and in the process eliminate much needless litigation. This case presents three such examples.

First, the Nevada Supreme Court in effect casually substituted the word "value" for the word "use" in the *Lucas*

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[24] The injustice of this approach is readily apparent. With only a moment's reflection, its irrationality is also clear. It reduces easily to a *reductio ad absurdum*. Example: Los Angeles County and its immediate surroundings until relatively recently consisted of a few Mexican land grant ranchos. All were large, and some were enormous: Simi consisted of 113,009 acres, Santiago de Santa Ana of 78,941 acres; La Puente and eight others consisted of over 40,000 acres. Beck and Haase, "Historical Atlas of California," p. 37 (University of Oklahoma Press 1974); *see also* Robinson, "Ranchos Become Cities" (San Pasqual Press 1939). The land that constituted some of these ranchos now supports hundreds of thousands of residents. Could a California regulating entity go back in time, identify one of these ranchos as a "single parcel" under *Penn Central*, and preclude all further development? According to the Nevada Supreme Court, and a few other courts, the answer is apparently "yes." (This example is by no means an historical anomaly; a modern day-analogue is the King Ranch in Texas, which spans several counties.)

formula, leading to its conclusion (855 P.2d at 1034-35; App. A14-15) that no compensation was due because, *inter alia*, the Properties retained value.[25] But land always retains some residual market value; the most draconian regulation never completely negates all value. The impact of stringent regulation may cause value to plummet to a fraction of former value, but there will always be someone willing to buy the property, if to do no more than hold and wait for a possible change in the political climate or controlling law that might lead to some economically productive use.[26] *See, e.g., Florida Rock*, 791 F.2d at 896.

If there can be a regulatory taking only when all value is destroyed, a taking would never occur. This Court should leave no doubt that when it says "use" it means "use" and the fact that some value remains — as it inevitably will — does not make the constitutional transgression disappear.

Second, the Nevada Supreme Court reached back 27 years, and — with no adjustment for inflation, return, or real increase in value — used historical cost (the initial 1966 cost to Mr. Kelly) in its investment-backed expectations analysis.

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[25] This improper substitution also offered a springboard for the Nevada Supreme Court to undertake the precise type of reciprocity of benefits analysis (855 P.2d at 1035; App. A16) this Court found to be unrealistic and essentially meaningless in cases such as this where a landowner is deprived of all economically beneficial uses. *Lucas*, 120 L. Ed. 2d at 814.

[26] As Professor Laurence Tribe aptly put it, "forcing someone to stop doing things with his property — telling him you can keep it, but you can't use it — is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else." Tribe, "American Constitutional Law," at 460 (1978) Professor Tribe understates the problem. In a very real sense the person who keeps title to his property but is denied all beneficial use — the precise situation in the case at bench — is worse off than the person whose property is grabbed and given to another: the owner who keeps title retains (1) the obligation to maintain the property, (2) tort liability for misadventures that might occur on the premises and (3) the privilege of paying ad valorem taxes. *See Averne Bay Const Co. v. Thatcher*, 15 N.E.2d 587, 592 (N.Y. 1938).

(855 P.2d at 1035; App. A16)[27] This analysis was inappropriate here *ab initio* in view of the *Lucas* categorical imperative. But in some cases where not all use is frustrated, the just compensation clause is nonetheless appropriately invoked to " 'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-319 (1987), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)),[28] investment-backed expectation analysis may be needed.

But relying on quarter-century old historical data, without ameliorating adjustment for inflation, interest or other real-world factors, is patently unfair.

Tolerance of this constitutional subterfuge will lead to citizens suffering identical impairment under a single ordinance, being treated radically different by virtue of the happenstance as to when their respective properties were purchased, thus raising serious equal protection problems. A landowner who bought property during the late-1980's

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[27] *See, e.g., Hodel v. Virginia Surface Mining & Reclaimation Ass'n, Inc.*, 452 U.S. 264, 294-95 (1981) and *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

[28] *See Griggs v. Allegheny County*, 369 U.S. 84, 88-90 (1962) stressing the government's obligation to acquire by purchase or condemnation what land it needs, and not cast the burden of the true cost of the public improvement on a more or less randomly chosen land owner, under the guise of regulation. That insight goes back to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415, where Justice Homes pointedly noted that the government is entitled only to such rights in property that it chooses to acquire, and it is not entitled to confiscate the balance on the grounds that the public wants it very much. This principle is firmly entrenched in Anglo-American jurisprudence: "The public can have no rights springing from injustice to others." *Walker v. Ware, Hadham etc. Rail Co.*, 12 Jur. (n.s.) 18 (1866). *See also* Michelman, *Property, Utility, And Fairness: Comments On The Ethical Foundations Of Just Compensation Law*, 80 Harv. L. Rev. 1165, 1192-93 (1967); R. Epstein, *Takings: Private Property And The Power Of Eminent Domain*, Ch. 5 at 57-58 (Harvard College 1985).

inflationary peak would enjoy protections his neighbor, who acquired his property in the depths of the depression, or by gift or bequest, is anomalously denied. Takings law does not accommodate this type of random subjectivity, nor should it. Only current fair market value is a fair standard. Only current fair market value can fulfill the Constitutional imperative that the "owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). And, only current fair market value is reconcilable with the unbroken line of cases requiring compensation to be determined based on the "fair market value of the property on the date it is appropriated . . . 'the time of the taking.' " *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9-10 (1984), quoting *Miller* at 374.

Third, the Nevada Supreme Court denied Mr. Kelly just compensation for a temporary taking on the ground that the IPES system offered a vehicle for eventual development of the Properties. Never mind (1) that at trial TRPA conceded, and the District Court found, that the Properties may never be developed; (2) that no new subdivision lots had been approved under IPES since 1982; and (3) the District Court found that "[i]t is difficult . . . if not absurd, to avoid calling the effect of the TRPA's code of ordinances on the Uppaway hilltop anything other than a temporary taking for a public purpose" (App. B84). If this sort of evasion is tolerated, and regulating entities can avoid compensation altogether by the simple act of promulgating some system or other telling owners of stultified properties that in the sweet bye and bye some use may be allowed, the guarantee of the just compensation clause is stripped of meaning.

And finally, even where some use is eventually permitted, there comes a time where the law says that a period of enforced idleness is of sufficient duration to require compensation. At the time the Supreme Court of Nevada issued its

opinion, Mr. Kelly had been deprived of all use of the Properties for (depending on the which of several possible triggering dates is selected) 11 to 19 years. These are multiples of periods this court has recognized as sufficient to constitute temporary takings; *see, e.g., United States v. Westinghouse Elec. and Mfg. Co.*, 339 U.S. 261, 262 (1950); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 374 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 375 (1945). One surmises that it is no coincidence — although it is astonishing — that the Nevada Supreme Court did not even cite *First English* in which this Court reaffirmed "that 'temporary' takings, which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.* at 318.[29] This Court held that under the *First English* facts, "invalidation of the ordinance without payment of fair value for the use of the property during this period time would be a constitutionally insufficient remedy." (*Id.* at 322) The period of the alleged temporary taking in *First English* was eight years. The period between the impairing regulation and the decision of this Court in *Lucas* was four years.[30]

Thus, this Court has made it crystal-clear that *even where the imposition of the governmental servitude leaves some significant private uses to the owner*, that does not make the partial taking any less a taking, for which compensation is required. Mr. Kelly may do nothing whatever with his vacant land for the foreseeable future. Thus — in spite of

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[29] It is all the more astonishing since the District Court considered *First English* at some length, particularly at App. B81-84 (although not for its temporary taking discussion).

[30] *Lucas* also cites with approval a Fourth Circuit case construing the South Carolina Beachfront Management Act in a manner suggesting a two-year period is sufficient. *Id.* at 798 n. 4, citing *Esposito v. South Carolina Coastal Council*, 939 F. 2d 165, 168 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 3027 (1992).

the facile "distinction" offered by the Nevada Supreme Court (855 P.2d at 1033-34; App. A13), this issue is contolled by *Lucas*.

D. The Nevada Supreme Court Decision — Which Holds That Interstate Compacts Automatically Preempt State Constitutional Rights, Irrespective Of Congressional Intent — Ignores This Court's Preemption Teachings And Creates A Dangerous Precedent For The Citizens Who Live In Areas Affected By Interstate Compacts

The trial court's ruling (App. D20) — affirmed by the Nevada Supreme Court without comment — that the Tahoe Regional Planning Compact impliedly preempted *all* state Constitutional claims evinces a complete misunderstanding of the preemption doctrine, was highly unfair to Mr. Kelly, and creates a particularly dangerous precedent.

Although this Court has yet to address the preemptive effect of an interstate compact, the general principles that govern federal preemption are familiar. For more than 170 years, it has been settled that federal law is the "supreme law of the land" [U.S. Const. art. VI, cl.2], and preempts conflicting state laws. *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). But as this Court has repeatedly cautioned, a finding of preemption represents an extreme intrusion into state sovereignty, and courts should accordingly exercise great restraint in applying the doctrine. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[31] In

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[31] Justice Stevens, writing for the Court, recently put the matter this way:

> Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by the federal act unless that is the clear and manifest purpose of Congress. *Cipollone v.*

(continued)

any situation, moreover, the "purpose of Congress is the ultimate touchstone of preemption analysis." *Cipollone v. Liggett Group*, 112 S.Ct. 2608, 2617 (1992).

Sometimes, Congress evinces this clear and manifest purpose to preempt by expressly including a provision in the statute itself. *See, e.g., Morales v. Trans World Airlines, Inc.*, __ U.S. __, 119 L.Ed.2d 157, 167 (1992). If no express provision exists, an intent to preempt may be inferred only where a particular state law directly conflicts with a Congressional enactment [*Pacific Gas & Elec. Co. v. Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 204 (1983)], or where a state law intrudes on a field so completely and totally occupied by federal law "as to leave no room for the States to supplement it." *Cipollone*, 112 S.Ct at 2617; *quoting, Fidelity Federal Savings & Loan Assn. v. De la Questa*, 458 U.S. 141, 153 (1982).

Curiously, neither the trial court nor the Nevada Supreme Court inquired at all into Congressional intent. If either court had, they could not have reached the result they did. It is difficult to imagine a federal law that more jealously guards state sovereignty than the Compact does.

As noted *ante*, the Compact in a severability clause provides that if any of its provisions are "held contrary to the constitution" of either California or Nevada, the reviewing provisions shall remain the force in both states and *all* provision shall remain in force in the state whose constitution is not offended. (App. E38) In view of this provision, the decisions below are untenable: why would Congress bother to provide for the situations in which the Compact runs afoul of provisions that supposedly cannot arise?[32]

(fn. continued)
Liggett Group, 112 S.Ct. 2608, 2617 (1992) (Citations omitted.)

[32] But if there was any remaining doubt, the Compact's structure also demonstrates that it was intended to preserve state laws, not abrogate them. In fact, this Court recognized the numerous state law attributes of the
(continued)

To find preemption the Nevada courts applied without analysis a Ninth Circuit case that held:

> Although the TRPA must be considered an agency of the contracting states, it operates under the aegis of federal law. Consequently, causes of action based on the state constitutional provisions must fail because the Compact, as federal law, preempts state law.

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1358 (9th Cir. 1977), *rev'd in part, aff'd in part sub. nom, Lake County Estates, Inc. v. TRPA*, 440 U.S. 391 (1979). *See also, Stephans v. Tahoe Regional Planning Agency*, 697 F.Supp. 1149, 1152 (D.Nev. 1988).

But *Jacobson* suffers from the same flaw as the decisions below: its superficial slide across the surface of the problem ignores the Congressional intent behind the Compact. *Jacobson's ipse dixit* to the contrary, "federal law" does not "preempt state law" unless Congress so wills. And because of the failure of each of these courts — the courts below and the Ninth Circuit — to even attempt the necessary analysis, their decisions defy the Compact itself.

(fn. continued)
Compact when it construed an earlier, but similar, version. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399-401 (1979). For example, the Compact enables any action to enforce or challenge its provisions to be maintained in the Nevada and the California state courts. Compact, Art. VI(j); App. E28. Further, voting members of TRPA are appointed exclusively by the Nevada and California state legislatures. Compact, Art. I(a)(1-3); App. E5-6. The federal government appoints only a single-non-voting member to TRPA. Compact Art. X, sec. 3; App. E39. TRPA meetings "must be open to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement." Compact, Art. III(d); App. E9. Finally, TRPA personnel standards must "conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada . . . ." Art. IV(b); App. E12.

The decision below renders the promise of federalism a hollow shell, and it is also be fundamentally inconsistent with *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 676-77 (1923), where this Court held that state courts could interpret their own takings clause provisions more broadly than this Court interprets the corresponding federal provisions.

This Court is the only court that can bring the law back into line. The Ninth Circuit has already spoken to the issue (albeit superficially and incorrectly) in *Jacobson*; other federal appellate courts will not likely decide cases involving the Compact. This case presents the Court with a unique opportunity to resolve the question in an expeditious and efficacious manner.

CONCLUSION

This petition squarely presents an opportunity to appropriately limit and otherwise clarify prior language of this Court, particularly the *Penn Central* quotation, that has engendered conflicts among courts, and is being persistently (and on occasion wilfully) misused. There is a great need to set right an apparently spreading misapprehension as to applicability of the takings clause to partial regulatory takings. The petition also squarely presents this Court with an opportunity to clarify the preemptive scope of interstate compacts, and to prevent the misapplication of that doctrine as well.

The case at bench, and the myriad of similar cases, do not present a simplistic dichotomized development versus preservation issue. The underlying question they present is, rather, whether the costs inevitably generated by regulations intended to secure or preserve public benefits are to be distributed fairly throughout the public as the constitution requires, or randomized on the basis of happenstance property ownership. Regulators and reviewing courts need to be pointedly reminded to stop trifling with the just compensation clause,

and implement both its letter and spirit. Mr. Kelly respectfully urges this Court to grant this petition, which offers a vehicle particularly suited to that end.

DATED: October 5, 1993.

Respectfully submitted,

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93-548

No.

Supreme Court, U.S.
FILED
OCT - 5 1993
OFFICE OF THE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM CODY KELLY, Trustee,
Petitioner,
vs.
THE STATE OF CALIFORNIA,
THE STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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WILLIAM CODY KELLY, Trustee,
Under Trust Dated December 12, 1962,
Appellant/Cross-Respondent,
v.
TAHOE REGIONAL PLANNING AGENCY,
Respondent/Cross-Appellant,
and
The State of California; The State of Nevada;
John K. Van De Kamp, Attorney General of the
State of California, and Frankie Sue Del Papa,
Attorney General of the State of Nevada,
Respondents.

No 22913.
Supreme Court of Nevada
July 8, 1993.

OPINION

PER CURIAM:

Appellant and cross-respondent William Cody Kelly ("Kelly") appeals the district court's judgment concluding that the Tahoe Regional Planning Agency land-use regulations did not deprive him of all economically viable use of his property and, therefore, did not effect a taking under the Fifth and Fourteenth Amendments of the United States Constitution requiring payment of just compensation. We affirm the district court's judgment.

In addition, respondent and cross-appellant Tahoe Regional Planning Agency ("TRPA") cross-appeals the district court's judgment that a prior federal district court decision confirming Kelly's "deemed approved" status of Uppaway Estates, including its excess land coverage variance, also exempted Kelly from compliance with the 1987 Plan IPES regulations. We conclude that the district

court properly confirmed that Uppaway Estates, including the excess land coverage variance, was "deemed approved" via the federal district court order; we, however, also conclude that the district court erred when it interpreted "deemed approved" status to mean that Kelly was exempt from compliance with all current TRPA land-use regulations and that Kelly could commence building immediately. We therefore, affirm in part and reverse in part.

The appeal and cross-appeal will be discussed in separate sections of this opinion.

FACTS

BACKGROUND

Lake Tahoe Basin rests over 6,000 feet above sea level and occupies approximately 320 square miles along the Nevada-California border. Lake Tahoe, the focal point of the basin, is "ultraoligotrophic," extremely clear with low concentrations of nutrients which support the growth of water-clouding algae. Evidence indicates that until recently Lake Tahoe had a 10,000-year history of near equilibrium in the gain or loss of nutrients. Surface and subsurface flows from Lake Tahoe's numerous watersheds introduce nutrients to Lake Tahoe. The amount of nutrients, especially nitrogen, carried to the lake depends upon the soils, vegetation and land-use within each watershed.

Impervious cover and surface disturbance of soil in the Lake Tahoe Basin impede the soils natural function as a medium for growth of vegetation and storage of nutrients. Vegetation is responsible for removing nutrients, particularly nitrogen, from precipitation, and therefore, plays an important role in the Lake Tahoe Basin ecosystem. Absent vegetation, erosion increases sediment loads to Lake Tahoe, thus storing nutrients in the lake rather than in the watershed where they belong. In addition, impervious cover prevents

the infiltration of precipitation, which results in heightened runoff.

Presently, Lake Tahoe is suffering an increase in algal productivity and a decline in clarity due to an elevated load of sediments and nutrients. As a result, Lake Tahoe and its tributaries are experiencing a downward trend in water quality. Sediment-caused disturbance of the lake's natural nutrient-loading equilibrium has resulted in an accelerated eutrophication of its once-prestine waters: a decline in annual average depth of visibility, a decline in water clarity, and a corresponding increase in algae. As the fertility of the system increases, Lake Tahoe is losing nearly half a meter per year of transparency.

Appellant and cross-respondent William Cody Kelly owns seven hilltop lots, the subject of this lawsuit, which overlook Lake Tahoe at Glenbrook, Nevada. In 1974, in an attempt to gain approval of the development of Kelly's Hilltop lots, as well as thirty-two additional lots on the forty-four acres at Uppaway Estates ("Uppaway"),[1] Kelly submitted to the Douglas County Planning Commission a subdivision "information report," which the Planning Commission subsequently approved. Thereafter, the Douglas County Board of County Commissioners approved the tentative map and issued an administrative permit to allow land coverage in excess of that permitted by Tahoe Regional Planning Agency ("TRPA") Land Capability Districts. Kelly then took the tentative map and administrative permit to TRPA Governing Board for review. The Governing Board held three separate

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[1] Uppaway Estates was a thirty-nine lot planned unit development to be constructed in three phases, of which Lots 33 through 39 ("Hilltop Lots") comprised Phase III. Kelly described the development in the information report as a "sited parcel land sale program." Most of Uppaway Estates was considered "high hazard," Class 1 capability, and limited to one percent land coverage. Kelly proposed a "variance" of approximately seven percent coverage in the one percent areas, including the Hilltop lots.

hearings, and the ensuing vote resulted in a lack of dual majority,[2] which, under the language of the 1969 Tahoe Regional Planning Agency Compact ("1969 Compact") at that time, resulted in approval.[3]

In 1975, TRPA filed suit in the United States District Court in an attempt to annul the Douglas County administrative permit. The United States District court "deemed approved" the Douglas County administrative permit in a Court Memorandum and Order. In October 1975, Federal District Judge Bruce R. Thompson confirmed this "deemed approved" status in a memorandum and order, in Tahoe Reg. Planning Agency v. Douglas County, et. al., Civil No. R-75-130. In the memorandum and order, Judge Thompson deemed the Uppaway Estates project, including land coverage in excess of the maximum amount for the property, approved by Douglas County through the issuance of a variance.

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[2] When the TRPA Governing Board reviewed the Uppaway Estates project, it received five negative votes from the California delegates, two negative votes and two affirmative votes from the Nevada delegates. One Nevada delegate was absent.

[3] Under the 1969 Compact, TRPA enacted a land use regulatory scheme requiring that local governments issue permits for projects in accordance with TRPA's regional standards in order to conserve resources and maintain an orderly development of the land. Further, the 1969 Compact required TRPA to review permits for major developments and variances, and TRPA's authority to approve or deny a permit was contingent on its obtaining a dual-majority vote of the Governing Board. The TRPA Governing Board consisted of ten members, five from each state, and a majority vote of the members present representing each state was "required to take action with respect to any matter." If TRPA did not "take final action" on a project within sixty days after the application was delivered to it, the project was "deemed approved." Hence, if a project received the approval of a majority of one state's delegation to the governing board but the denial by the other, there would be no "action," and the project would be "deemed approved."

The TRPA Compact was amended in 1980,[4] and two plans, the 1984 Plan and the 1987 Plan, have since been implemented in an effort to comply with the 1980 Compact. Since the 1980 Compact, Kelly has been unable to gain TRPA approval for the development of his Hilltop lots.

On or about Juy 20, 1981, Robert Lahmann ("Lahmann"), vice-president of Uppaway Development Company, contacted TRPA with proposed modifications to the Hilltop. Lahmann proposed moving various lots, eliminating some lots and converting the rail access system (funicular) to the Hilltop into a roadway.

On October 29, 1981, TRPA specifically notified Kelly of the fact that the Hilltop portion of Uppaway had been rated as "in need of further consideration." TRPA evaluated Uppaway and determined that Phases I and II were

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[4] In December 1980, Nevada and California, with Congressional approval, extensively amended the 1969 Compact. The amended compact ("1980 Compact"; Pub.L. 96-551, 94 Stat. 3233 (1980); NRS 277.200; Cal.Gov.Code § 66801) dramatically changed TRPA's composition, functions and duties. Prescribing a governing board consisting of fourteen members, the 1980 Compact enacted stricter project-review provisions.

The 1980 Compact mandated that TRPA approve all projects, and no project could be approved unless found to comply with the regional plan and the ordinances of TRPA. In addition, the new compact mandated that TRPA adopt environmental thresholds in order to protect Lake Tahoe. On August 25, 1981, TRPA Ordinance 81-5 went into effect implementing the Lake Tahoe Regional Water Quality Management Plan. Under the terms of this ordinance, TRPA now required a "case-by-case" system of review of single-family development on land within the State of Nevada. Ordinance 81-5 permitted case-by-case review of lots within subdivisions classified as "adequate" or "potentially adequate." The ordinance required a team of experts to evaluate all subdivisions to determine their eligibility for either classification. Subdivisions classified as "in need of further consideration," those lacking substantial construction of roads, utilities or drainage structures, were not eligible for the case-by-case program.

"potentially adequate" and that Phase III was rated as being "in need of further consideration" because the subdivision improvements as to Phase III had not yet been constructed. TRPA also advised Kelly of the method for appeal of the determination. On December 23, 1981, TRPA notified Lahmann by letter that it had reviewed his proposal and that the proposal would have to be submitted in the form of an application to modify the Uppaway map and improvement plans.

On January 21, 1982, TRPA notified Kelly again of the Phase III evaluation and again advised Kelly of the appeal procedure. These notifications advised Kelly that he could not proceed with a case-by-case review of the Hilltop lots until Phase III received a rating of "adequate" or "potentially adequate."

During 1982, TRPA adopted its Environmental Threshold Carrying Capacities as mandated by the 1980 Compact. Included in those thresholds were standards for water quality, both in Lake Tahoe and in its feeder streams, and for soil conservation, including the amount of impervious surface that could be created without stress upon the environment.

On July 27, 1982, Kelly submitted applications for case-by-case review concerning Lots 33 through 38, inclusive, but never filed an appeal concerning Phase III's rating of "in need of further consideration." During the fall of 1982, numerous applications had been filed in the case-by-case review office. On December 30, 1982, Douglas County issued residential building permits for Lots 33 through 38. Each building permit, however, was subject to the explicit condition that the construction plans be approved by TRPA.

On January 24, 1983, TRPA notified Kelly that on-site inspection of the lots would have to be delayed due to the heavy snowfall that year. TRPA continued its attempts to complete the case-by-case review of the lots during the

summer of 1983. On July 21, 1983, TRPA offered to work specifically with Kelly in an attempt to obtain an inspection of the subdivision during the summer of 1983 and to try to gain a potentially adequate rating.

On August 26, 1983, however, TRPA Governing Board adopted a moratorium preventing further evaluations of case-by-case applications, pending the adoption of an amended regional plan mandated by the 1980 Compact.[5] TRPA did advise Kelly that it would attempt to complete immediately processing of the Hilltop lots' case-by-case applications as soon as the Governing Board lifted the moratorium.

In October 1983, Kelly's contractor completed the off-site improvements and access road to the Hilltop lots. On December 2, 1983, Kelly's counsel advised him that, as a result of a conversation with TRPA staff, applications for the Hilltop lots were ready to be processed, but would be required to await TRPA's adoption of the amended regional plan.

In 1987, TRPA Governing Board developed a new plan in an attempt to integrate the adopted environmental threshold carrying capacities with the policies of the 1980 Compact.

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[5] On April 26, 1984, TRPA adopted an amended regional plan ("1984 Plan") in an attempt to comply with the mandates of the 1980 Compact. The 1984 Plan provided that completed case-by-case applications on file before August 26, 1983, would be processed under the old procedures. On April 26, 1984, the very day the TRPA adopted the 1984 Plan, the State of California sued TRPA, alleging the plan did not comply with the 1980 Compact. On or about May 1, 1984, the federal district court agreed and issued a restraining order prohibiting TRPA from approving projects under the 1984 Plan. On August 9, 1984, the district court preliminarily enjoined TRPA from approving any projects within the basin, subject to certain limited exceptions not applicable in this case. The Ninth Circuit Court of Appeals affirmed the preliminary injunction on appeal. *People of California v. Tahoe Reg. Planning Agency*, 766 F.2d 1308 (1985).

In July 1987, the new plan ("1987 Plan") went into effect. In an effort to regulate the uncontrolled development that would likely ensure the permanent loss of Lake Tahoe to eutrophication in the near future, TRPA Governing Board developed the Individual Parcel Evaluation System ("IPES"). TRPA incorporated this new IPES system in the 1987 Plan. IPES satisfied the 1980 Compact requirements and was designed to direct residential development first to those areas most suitable for it, in accordance with the environmental thresholds and other considerations such as infrastructure and progress toward accomplishing water quality improvement programs.

Under IPES, TRPA sends a team of experts to evaluate each vacant single family parcel, primarily for erosion hazard and runoff potential. Each evaluated lot receives a score, and then, in each of the five counties around the Tahoe Basin, each such lot is ranked against its counterparts. Basted upon a statistical formula, TRPA then establishes an initial minimum score. Those lots with scores above that minimum were eligible for development, subject to other conditions not at issue in this case; on the other hand those with scores "below the line" were required to wait for eligibility. The numerical level defining top-ranked parcels may be lowered in any local jurisdiction on an annual basis.[6] On or about January 1, 1989, TRPA Governing Board established 725 as the initial, numerical score, above which are the top-ranked parcels eligible to receive building permits.

Under the 1987 Plan, Kelly was required to have his Hilltop lots evaluated under the 1987 Plan, which included

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[6] Lowering of the line is dependent upon findings by TRPA, inter alia, that the jurisdiction has a monitoring program in place pursuant to Chapter 32 of the TRPA Code, that demonstrable progress is being made there on capital improvements for water quality and that there is a satisfactory level of compliance with conditions upon project approvals in the jurisdiction.

IPES. Kelly's Hilltop lots were evaluated under IPES[7] and Lot 36 received a score above 725. Since Lot 36 received a passing score, it became eligible immediately.

Prior to the commencement of the trial, Kelly appealed the remaining scores. Under the appeal procedure, Kelly's lots with scores below 725 were reevaluated under IPES by a new team, and new scores were issued. The appeal process completed during the course of the trial, resulted in all but four of Kelly's lots becoming immediately eligible.[8]

On July 24, 1987, Kelly filed suit for "Specific Performance, Inverse Condemnation, Declaratory, Injunctive and Monetary Relief and Punitive Damages" against respondent and cross-appellant TRPA, respondent State of Nevada ("Nevada"), and respondent State of California ("California"). Kelly alleged seven claims for relief.[9] On August

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[7] Kelly's lots received the following scores:

Lot No.	Score
33	679
34	531
35	629
36	758
37	615
38	635

[8] The re-evaluated scores were as follows:

Lot No.	Score
33	725
34	694
35	737
37	702
38	693

[9] Kelly alleged the following: 1) temporary taking of the lots since February 26, 1981, without compensation in violation of unspecified constitutional provisions; 2) estoppel against TRPA "from denying approval" of building permits for the lots; 3) vested rights as a result of assurances by TRPA staff and an agreement, dated July 22, 1982; 4) permanent taking of the lots without just compensation in violation of the Fifth and Fourteenth Amendments to the United

(continued)

23, 1989, the district court granted in part and denied in part defendants' motions for summary judgment. In February 1990, Kelly proceeded to trial against TRPA on the two remaining issues: takings and substantive due process. After a five-week trial, the district court concluded the following in a tripartite ruling: 1) TRPA based the IPES system on solid scientific principles and rationally and evenly applied it; 2) TRPA's 1987 Plan and TRPA Code had not deprived Kelly of his property without compensation; and 3) although Kelly does not possess a vested right for building approvals for the Hilltop lots, only routine aspects of the 1987 Plan and TRPA Code apply to Kelly because of Uppaway's "deemed approved" status. In addition, the district court "ratified and confirmed" the legal conclusions in its order partially granting and partially denying motions for summary judgment, except as they were inconsistent with the decision.

On July 13, 1990, the district court filed its 128-page Decision.[10] On November 5, 1991, the district court filed

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(fn. continued)
States Constitution and Article 1, Section 8, of the Nevada State Constitution, resulting from TRPA's 1984 and 1987 Plans and implementing ordinances; 5) deprivation of economic use of Kelly's property without due process of law in violation of said constitutional provisions; 6) denial of equal protection of the laws as a result of the enactment of TRPA's 1987 Plan and implementing ordinances; and 7) violation of the Federal Civil Rights Act, 42 U.S.C. Section 1982.

[10] On February 20, 1991, the district court also filed a decision on post-trial motions which, with one exception, denied both Kelly's and defendants' motions for attorney's fees. The district court did allow California $7,500.00 because of Kelly's "hide and seek tactics" with respect to an expert witness. Although the district court denied Kelly's request for costs, it granted defendants' similar request, but limited those costs to costs in defense of the IPES system. On November 5, 1991, after further hearings, the district court entered an explanatory order concerning the award of costs and Uppaway land coverage, in which, inter alia, the district court awarded defendants costs in the sum of $241,836.69.

its findings of fact, conclusions of law and judgment consistent with its Decision.

THE KELLY APPEAL

On direct appeal, Kelly's principal argument is that the district court erred in concluding that TRPA land-use regulations did not deprive him of all economically viable use of his property and therefore, did not effect a taking under the Fifth[11] or Fourteenth[12] Amendments of the United States Constitution requiring payment of just compensation. Specifically, Kelly contends that the evidence does not support the district court's conclusion that "[n]either the 1987 Regional Plan for the Lake Tahoe Basin nor the code of Ordinances, nor any predecessor plan or ordinance, have [*sic*] deprived Mr. Kelly of his interest in property in a manner requiring compensation under the Fifth and Fourteenth Amendments to the United States Constitution."

"The district court's findings of fact will not be set aside unless clearly erroneous." *Burrows v. Progressive Casualty Ins.*, 107 Nev. 779, 782, 820 P.2d 748, 750 (1991) (citing *Hermann v. Varco-Pruden Buildings*, 106 Nev. 564, 566, 796 P.2d 590, 592 (1990)). Further, "[w]here the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence." *Trident Construction Corp. v. West Electric, Inc.*, 105 Nev. 423, 427, 776 P.2d 1239, 1242 (1989) (citing *Dickstein v. Williams*, 93 Nev. 605, 608, 571 P.2d 1169, 1171 (1977)).

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[11] "No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

[12] "No state shall . . . deprive any person of life liberty or property without due process of law . . . ." U.S. Cost. amend. XIV.

Before we can determine whether the district court properly concluded that TRPA regulations did not constitute a taking, this court must first examine whether the district court erred in making an "ad hoc factual inquiry" regarding Kelly's takings claim.

Kelly contends that the district court erred in making an ad hoc factual inquiry in light of the "late-breaking" Supreme Court decision *Lucas v. S. Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1920), and that *Lucas* is "dispositive" of this issue because the facts in *Lucas* allegedly "mirror those at hand." Kelly argues that he has been deprived of all economic use of his property and, therefore, is entitled to "categorical" compensation, regardless of the state's interests.

As Kelly points out, in June 1992, the United States Supreme Court published *Lucas*, a decision that held, under certain circumstances, an ad hoc factual inquiry was not required and a landowner could "categorically" receive payment as compensation for a taking in violation of the Fifth and Fourteenth Amendments. *Id.* at __, 112 S.Ct. at 2893. The Supreme Court stated the general rule regarding "takings" violations: The "Fifth Amendment is violated when a land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.' " *Id.* at __, 112 S.Ct. at 2894 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980)). The Court went on to say that "when the owner of real property has been called upon the sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at __, 112 S.Ct. at 2895 (footnote omitted).

The Supreme Court then discussed the history of "regulatory takings" jurisprudence. The Court noted that there is no " 'set formula' " for determining whether a regulatory action constitutes taking, and that in the past, the

Court has preferred to " 'engag[e] in . . . essentially ad hoc, factual inquiries.' " *Id.* at __, 112 S.Ct. at 2893 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978)). The Court, however, did point out two situations where regulatory actions are "compensable without case-specific inquiry into the public interest advanced in support of the restraint": 1) "regulations that compel the property owner to suffer a physical 'invasion' of his property . . . no matter how minute the intrusion, and no matter now weighty the public purpose behind it . . . . [; and 2)] where regulation[s] den[y] all economically beneficial or productive use of land." *Id.* __ U.S. at __, 112 S.Ct. at 2893.

We conclude that *Lucas* is inapplicable because the two cases, *Lucas* and the instant case, are clearly distinguishable; the similarities[13] between this case and *Lucas* are far less significant than the differences. In *Lucas*, the Act flatly prohibited any permanent structures on Lucas' residential lots; in Kelly's case, TRPA regulations do not flatly prohibit development. TRPA regulations temporarily limit, rather than forever preclude, development in environmentally sensitive areas: if a particular parcel meets the minimum IPES standard, that parcel becomes immediately eligible for development. Moreover, Kelly's Lots 35 and 36 have each received IPES scores high enough to make them immediately eligible for development, and Lots 33, 34, 37 and 38 may be eligible in the future when TRPA exercises its statutorily approved authority and lowers the IPES standard. We, therefore, conclude that *Lucas* is not controlling in this case and that the district court properly conducted the required ad

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[13] Both parties purchased undeveloped land with the intent to develop it further and for eventual resale. Also, in both cases, the states enacted the regulations in order to protect environmentally sensitive areas, and the regulations were enacted after the purchase of the property. Lastly, in both cases, the states enacted the regulations in order to advance a legitimate state interest.

hoc factual inquiry weighing the state's interest against Kelly's interests.

In light of the fat that *Lucas* is inapplicable to the case at hand, this court must then determine whether the district court erred in concluding that TRPA regulations did not effect a "temporary taking" of Kelly's Hilltop lots. In *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987), the Supreme Court noted that it has been unable to develop a set formula for the resolution of takings claims and, therefore, it has mandated an "ad hoc factual inquiry" process to resolve takings issues. *Id.* at 495, 107 S.Ct. at 1247. Under this inquiry, this court must evaluate 1) whether the district court properly concluded that TRPA regulations substantially advanced a legitimate government interest and 2) whether that government interest outweighed Kelly's private interest in developing the Hilltop lots.

First, the district court properly concluded that TRPA regulations substantially advanced a legitimate government interest: the protection of Lake Tahoe Basin — a national treasure. In its findings of fact, the district court noted that the 1969 Compact's stated purpose was "to maintain an equilibrium between the region's natural endowment and its manmade environment" and to establish an "areawide planning agency [TRPA] with power to adopt and enforce a regional plan of resource conservation and orderly development." The district court concluded that TRPA regulations are a "valid exercise of police power." We conclude that such governmental purposes have long been recognized as legitimate governmental interests. See *Agins. v. Tiburon*, 447 U.S. 255, 261, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Second, the district court, after weighing the competing interests of both Kelly and TRPA, properly determined that TRPA land-use regulations did not deprive Kelly of all

economically viable use of his property. See *Agins*, 447 U.S.A at 260-61, 100 S.Ct. at 2141 ("Although no precise rule determines when property has been taken . . . the question necessarily requires a weighing of private and public interests.") In order to determine whether Kelly has been deprived of all economically viable use of his property, three essential factors must be considered in the weighing process: 1) economic impact of land-use regulations, which includes a valuation analysis; 2) interference of land-use regulations with landowner's reasonable investment-backed expectations; and 3) character of government action. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987) (quoting *Hodel v. Virginia Surface Mining and Recl. Assn.*, 452 U.S. 264, 294-95, 101 S.Ct. 2352, 2369-70, 69 L.Ed.2d 1 (1981)).

When considering the first factor, we note that Kelly's lots remain valuable assets.[14] Kelly's own appraiser testified to the fact that the Hilltop lots maintained substantial value during the period of time in question. Furthermore, Uppaway must be viewed as a whole, not as thirty-nine individual lots when determining whether Kelly has been deprived of all economic use. See *Penn Cent. Transp, Co. v. New York City*, 438 U.S. 104, 130, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978) ("Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."). When viewed as a whole, we conclude that Kelly has not been deprived of all economic use; only the seven Hilltop lots have been affected by TRPA's regulations, not the entire Uppaway subdivision. Moreover, at this point in time, the current IPES standard only precludes four of the seven lots from being eligible for development, and

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[14] During oral argument, Kelly's counsel estimated the value of the Hilltop lots to be between two and four million dollars.

those lots are expected to receive approval within the next few years.[15]

When considering the second factor, Kelly's reasonable investment-backed expectations have been satisfied. At the time Kelly purchased Uppaway Estates in 1966, he had adequate notice that his development plans might be frustrated. At the time of the land purchase, the Lake Tahoe Regional Planning Commission had published the Report of the Lake Tahoe Joint Study Committee, and it discussed California and Nevada's concerns over rapid growth in the Lake Tahoe Basin and the need for land-use planning regulations. Moreover, Kelly's financial expectations have also been met because he purchased the original estate for $500,000.00, lived in the main house for nearly twenty years and then sold the main house alone for $1,100,000.00. Kelly also developed and sold most, if not all, of the parcels, with the exception of the seven Hilltop lots, yielding him a substantial profit.[16]

When considering the third factor, the district court properly found that the actions of TRPA were not only for the public benefit, but for Kelly's benefit as well. Specifically, the district court stated in its decision that "every single one of Mr. Kelly's lots will eventually diminish in value if Lake Tahoe is despoiled. IPES is a burden, surely, but it also conveys significant personal benefits to each landowner it serves."

In weighing these three factors, we conclude that the district court properly determined that TRPA can postpone

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[15] TRPA regulations contain a provision that allows the IPES "cut-off" level to be lowered on an annual basis which, if the IPES "cut-off" number was lowered, the remaining three lots would receive building approval.

[16] During oral argument, Kelly's counsel admitted that Kelly had already received approximately 5.6 million dollars from prior sales within Uppaway.

building in critical areas for a "reasonable period of time" as long as the "benefit received by the property from the ordinances is direct and substantial and the burden imposed is proportional." Further, there was substantial evidence to support the district court's conclusion that TRPA regulations, past or present, did not "deprive [ ] Mr. Kelly of his interest in property in a manner requiring compensation." We, therefore, will not disturb the district court's determination on appeal. *Trident Construction Corp. v. West Electric, Inc.*, 105 Nev. 423, 427, 776 P.2d 1239, 1241 (1989).

We have considered Kelly's other contentions and conclude that they also lack merit.

THE TRPA'S CROSS APPEAL

TRPA cross appeals and argues that the district court erred when it determined that the federal district court's order granting Kelly "deemed approved" status[17] of Uppaway Estates exempted Kelly from compliance with the 1987 Plan IPES regulations. Specifically, TRPA argues that the district court erred in concluding that Kelly "does not have to obtain an allocation under Chapter 33 of TRPA ordinances for [the Hilltop] lots" and that there is "no legal impediment to Mr. Kelly preventing him from proceeding immediately to build or sell his seven (7) hilltop lots."

The underlying question for this court to decide on the "deemed approved" issue is whether, in light of the federal district court decision, Uppaway Estates could be subjected

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[17] The federal district court order regarding the status of Kelly's Uppway project stated the following in pertinent part: In the present case, the tentative map [including the variance for land coverage in excess of the maximum allowed for the property] for Uppaways [*sic*] Estates was approved by defendant agencies [Douglas County] and was submitted to TRPA for action. No action was taken within sixty days and it is deemed approved. (Emphasis added.)

to subsequent regulations governing aspects of timing of construction, such as the 1987 Plan's IPES system. The district court answered the question negatively. We disagree.

First, a brief review of the federal district court order is necessary. Judge Thompson held in his order that the tentative subdivision map for Uppaway Estates was "deemed approved" under Article VI(k) of the 1969 Compact. Judge Thompson found that Kelly's project was "deemed approved" as a matter of law because TRPA Governing Board had failed to attain a "dual-majority vote" for approval or denial under Article III(g). Judge Thompson relied on *Younger v. Tahoe Reg. Planning Agency*, 516 F.2d 215 (9th Cir. 1975), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975), and observed that in light of *Younger*, TRPA board's vote on Kelly's project "constituted no action by TRPA and brought into operation the provisions of Article VI(k) of the [1969] Compact with the effect that the proposal was deemed approved."

When interpreting the meaning of "deemed approved," this court is cognizant of the policy implications of such a decision. TRPA implemented the IPES regulation scheme as a means to address equitably the pressing demand to develop thousands of single-family lots in a lake basin suffering rapidly diminishing environmental quality. IPES directs development to the areas most able to withstand it in an attempt to attain and maintain environmental threshold carrying capacities. Essentially, IPES determines "what" lots may be built on, "where" those lots may be located, "how" a developer may distribute land coverage, and most importantly, "when" those lots may be eligible for development. We conclude that a district court cannot ignore the environmental concerns of TRPA and cannot reject IPES out of hand. The Lake Tahoe Basin appears to be in an environmental tailspin which will eventually destroy it permanently unless preventative measures can be implemented and enforced immediately. Further, if Kelly is not required to

follow the IPES regulatory scheme, that decision could cause irreparable harm to the Basin because all other landowners in Kelly's position, those whose permits were approved prior to the implementation of the IPES system, would be allowed to develop their land immediately. If this court allows this decision to stand, the development of less-than-ideal lots could precipitate the degradation of the water quality of Lake Tahoe and Lake Tahoe Basin's natural beauty.

In conclusion, the district court properly determined that Uppaway Estates, including its excess land coverage variance, was "deemed approved" via Judge Thompson's federal district court order. The district court, however, erred when it interpreted "deemed approved" status to mean that Kelly was exempt form Chapter 33 of TRPA Ordinances, that he was exempt from all non-routine requirements of the 1987 Plan and that Kelly could commence building immediately. We conclude that the federal district court order that "deemed approved" Uppaway Estates as a matter of law only referred to "where" (plat map approval with all appropriate designations) and "how" (approval of the amount of land coverage for each parcel), not to "when" Kelly can commence building on his lots. Judge Thompson's order did not address "when" the lots could be developed, and we conclude that this question can only be answered in light of the 1980 Compact including the current IPES standards. We, therefore, affirm the "deemed approved" status of Uppaway Estates, but reverse the district court's conclusion that Kelly "does not have to obtain an allocation under Chapter 33 of TRPA ordinances for [the Hilltop] lots" and that there is "no legal impediment to Mr. Kelly preventing him from proceeding immediately to build or sell his seven (7) hilltop lots."

CONCLUSION

With respect to appellant Kelly's appeal, we affirm the district court's judgment in all respects; and with respect to TRPA's cross-appeal, we reverse the trial court's judgment exempting Kelly from compliance with the 1987 Plan IPES regulations.[18]

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[18] In February 1993, TRPA moved to strike Appendix B from Kelly's reply brief. Appendix B is the minutes of a September 22, 1992, TRPA Governing Board Meeting that demonstrate that TRPA had not lowered the IPES lot line since 1987. In turn, Kelly filed an opposition and motion for this court to take judicial notice of the contents of Appendix B. We grant TRPA's motion to strike Appendix B. *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251, 272 n. 20, 830 P.2d 107, 121 n. 20 (1992) ("[O]ur review is properly confined to the record made and considered . . . ."); see also *In Re Marriage of Holder*, 137 Ill.App.3d 596, 91 Ill.Dec. 926, 931, 484 N.E.2d 485, 490 (1985) (Appellate courts should not use judicial notice to expand scope of review where matters subject of judicial notice were "matters which were highly disputed at trial and not properly part of the record on appeal.")

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Case No. 18325

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

WILLIAM CODY KELLY, TRUSTEE
Under Trust Dated December 12 1962,
Plaintiff,

vs.

TAHOE REGIONAL PLANNING AGENCY,
Defendant.

/

DECISION

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DECISION

I. INTRODUCTION:

On the surface, this case involves six or seven lots on a ridgeline above the eastern shore of Lake Tahoe. In another sense, it also impacts upon the future of the Tahoe Regional Planning Agency, and perhaps even upon the future of Lake Tahoe. The attorneys tried the case in a manner suggesting that they were ever mindful of these deeper implications. Appearing on behalf of Plaintiff William Cody Kelly were Daniel R. Walsh, Esq. and Jon Yaple, Esq.; appearing for the Tahoe Regional Planning Agency was Gary Owen, Esq.; appearing for the State of California was Deputy Attorney General, Richard Skinner, Esq. From time to time Marta Adams, Esq. and other deputies from the Nevada Attorney General's Office appeared for the State of Nevada. Dozens of witnesses were called; hundreds of Exhibits were marked and admitted; the parties and their counsel have been through the ordeal of an extensive briefing schedule, both before and

after trial. Assuming it can ever claim to be in such a position, the Court considers itself to be sufficiently advised in the facts and the law to render this Decision.

A section containing a "Brief History of the Case" and a section entitled "What Happened at Trial" precede three Discussion sections. Each Discussion section either begins or concludes with a pivotal Conclusions statement disposing of a major issue. Because of the nature of the case, this decision is lengthy.

II. BRIEF HISTORY OF THE CASE:

The hilltop lots the subject of this controversy are located in a planned unit development called Uppaway, just south of historic Glenbrook, Nevada. In a way, the relevant history of Uppaway goes back to the start of planning and development in the Tahoe basin.

The Max C. Fleischmann Foundation first commenced a cooperative planning association for the whole lake basin in 1957. Somewhat ironically, Mr. Kelly acquired his forty-four (44) acre parcel, popularly known as the old Fleischmann estate, from the heirs of Sara Hamilton Fleischmann almost ten years later.

In the late fifties local authorities were approving about 1000 lots a year at the Lake. Then, during the early sixties this figure almost doubled, and by 1963 there were almost 15,000 lots on subdividers' maps. Concerned over pollution, the Lake Tahoe Area Council, formed in 1959, began work on a plan they called the "1980 plan", dubbed such because it purported to look forward to how the basin would look in that year.

By the time Mr. Kelly acquired his property, the California counties had adopted the "1980 Plan", which foresaw a basin with a population (including tourists) of 313,000 people (up from 126,300 in 1962). But the Nevada counties

refused to consider a development "freeze", and Washoe County in particular rejected the "1980 Plan".

The same year that the Nevada and California legislatures passed the TRPA legislation, (1968) no less than 3,462 lots were created by landowners, and this surge in development continued over the next three years while Congress was ratifying the TRPA legislation and the initial Plan was being drafted.

Mr. Kelly did not join this early "push" toward development, however, since he didn't proceed with his plans for development at Uppaway until 1973 when he first appeared before the Douglas County Planning Commission. His development called for the creation of thirty-nine so-called "lots" or 2,500 square foot building "envelopes"; it was approved by Douglas County in 1974 and Mr. Kelly went on to the TRPA where he presented his proposal to the Board in 1975. All of the remaining acreage in his subdivision was dedicated to common area and common amenities such as a pier, a barbeque and a tennis court. The subdivision was then, and is now, characterized by three relatively discrete sections — the Lakeshore parcels, the mid-level or so-called tennis court lots, and the hilltop lots.

The TRPA Compact at that time had an amended "dual majority" feature which curtailed affirmative planing controls by the Agency unless a majority of *both* state representatives approved. Mr. Kelly didn't win a majority vote before the TRPA, but he claimed his subdivision was "deemed approved" under the Compact language. The TRPA thought differently and sued.

On October 24, 1975, Federal District Court Judge Bruce Thompson agreed with Mr. Kelly's interpretation of the Compact and held that TRPA's failure to take action on the subdivision application within sixty (60) days caused it to be "deemed approved."

For the next several years, TRPA kept busy revising its Compact to assert more direct authority over development, and Mr. Kelly kept busy revising and preparing his subdivision for residential sales.

He created the Uppaway Development Company, a Nevada corporation, and had the family trust, which owned the land, deed 28 of the 39 lots to the company, retaining ownership of eleven (11) lots and the common areas. He also completed the first two phases of the subdivision — the lakefront and the tennis court area — with no less than six amended maps that had the effect, among other things, of reconfiguring many of the box-like building "envelopes" on the lakefront so that they would be more suitable for executive homes.

In the meantime, the TRPA had embarked upon a tortuous path leading eventually to the 1987 Regional Plan. By 1982 and Environmental Impact Statement had been drafted and the TRPA had adopted "carrying capacities" for the Lake. The early eighties also marked the establishment of the Lake Tahoe Interagency Monitoring Program (hereafter LTIMP) which created monitoring stations on selected streams and buoys to record changes in the environment.

In 1982, Mr. Kelly began to focus on the hilltop and after extensive discussions with Agency staff, he filed a Seventh Amended Map which eliminated lot 39 and changed the manner of access to the hilltop. By this time, TRPA Ordinance 81-5 was in effect. A planning team implementing this ordinance and evaluating all subdivisions in the basin had not felt that Mr. Kelly's third phase — the hilltop — was adequate under the Water Quality Management Plan. The significance of this adverse rating prevented individual building site applications at the hilltop from being processed on a case-by-case review basis. Serious penalties attended violations of the ordinance.

Without formally withdrawing its finding of inadequacy, the Agency accepted Mr. Kelly's mid-summer applications

for case-by-case review concerning the six remaining hilltop lots, 33 through 38, but by the time they got around to opening the files (hundreds of such reviews were pending), it was wintertime and snow prevented the necessary on-site inspections.

In 1983, further negotiations were being conducted and the off-site improvements for the hilltop lots were being completed but no action had been taken on Mr. Kelly's applications by late August when the TRPA, fearing litigation, placed a moratorium on its processing of all building applications.

By the spring of the following year the TRPA adopted its Amended Regional Plan and moved toward lifting its self-imposed moratorium, only to be met with a lawsuit brought by the State of California. The Federal District Court in California issued a temporary restraining order and, eventually, a preliminary injunction, which froze all applications in place pending the outcome of the lawsuit.

Over three years elapsed before the lawsuit was dismissed by agreement. Settlement talks in 1984 led nowhere until something called Consensus Building Workshops were held in 1985 and 1986. These extensive workshops led to revised goals and policies which were adopted by the TRPA in 1986 and 1987. They also gave birth to "IPES" or the Individual Parcel Evaluation System which is being challenged by the instant lawsuit.

Realizing that "IPES" would let him apply for a building permit on perhaps only one of his hilltop lots and having spent several years battling to get the hilltop open for a sales program, Mr. Kelly filed this lawsuit on July 24, 1987. In a multi-count complaint against the TRPA and the states of Nevada and California, Mr. Kelly alleged that he had been effectively denied the protections of the due process and equal protection clauses under both state and federal constitutions; he claimed that his property has been inversely condemned; he claimed that the IPES rating system which

continues to further postpone his building plans has no rational basis in science or logic and for this reason is constitutionally defective; he claimed civil rights violations under 42 USC section 1983; he claimed vested rights and estoppel; and, finally he claimed that the Tahoe Regional Planning Agency has become an agent of the states who are vicariously responsible in damages for TRPA's allegedly confiscatory activities.

In a twenty-two page order dated August 23, 1989, this Court granted partial summary judgment and indicated its intent to dismiss the state defendants (that decision will be confirmed at the end of this opinion). The Court also dismissed a number of counts. Left for trial were three major issues with a number of subtopics. Basically, they are:

1. Whether there is a legally substantive rational basis for the TRPA's administrative regulations;

2. Even assuming the rationality of TRPA's rules, has its conduct given rise to a cognizable "takings" claim. A major subtopic here concerns the economic impact of the regulations on the Plaintiff's particular investment expectations for his property; and

3. Whether the Plaintiff, who has been ruled not to have a vested right to building permits, nonetheless has an already-adjudicated position which exempts him from some, but not all, of the TRPA's current administrative regulations governing construction on the hilltop.

This concludes the Brief History section which has remarked on events transpiring over the last forty years or so. The next section, which remarks upon what happened at trial, concerns man's efforts to understand what has transpired at Lake Tahoe during the Quatenary period of the last two million years, or so.

III. WHAT HAPPENED AT TRIAL:

The controversy between William Cody Kelly and the TRPA is defined by trial exhibits and by trial testimony of witnesses who were for the most part experts in one field or another. There were almost five weeks of testimony and thousands of pages of exhibits. To place the Discussion Sections which follow into proper context, the Court is going to go through a somewhat tedious process of summarizing the testimony of every witness who appeared. A few preliminary comments are in order, however, so as to acquaint unfamiliar readers with some of the special lexicon used by these witnesses.

"Nutrients", for example, have a negative meaning in this case. Basic nutrients such as nitrogen and phosphorous are the elements which cause lake-fouling algae to flourish in an otherwise inhospitable or "infertile" Tahoe basin environment. The TRPA's premise is that man's activities are bringing these unwanted nutrients as well as inorganic sediments to the lake, causing loss of water clarity and accelerating the "eutrophication" process, or the gradual deterioration of water quality in the lake.

The lake basin is relatively "infertile" because most of its soil types are "granitic", or evolve from the granite and granite-like rock outcroppings which dominate the landscape in this region of the Sierra Nevada Mountains. Eons ago, glacial advances and retreats ground and scoured Tahoe's basin clear to baserock. As a consequence most deposits of offending nutrients as well as their transport, uptake and transformation take place in a relatively clean and thin veneer of sandy soil, pine needles, and "humus", or so-called "grus" which overlies the scoured granite. This is Tahoe's rather poor excuse for topsoil. In this sense the Tahoe basin is impoverished because it lacks rich, fertile, loamy soil, but it is also for this exact reason that Tahoe itself is so magically pristine and free of fouling organisms.

TRPA's Individual Parcel Evaluation System, or "IPES" is based on theories of prospective nutrient transport from individual lots. Thus, the whole IPES system talks in terms of "erosion hazard", "runoff potential", proximity to the lake itself or to streamzones, slope, lot size, vegetation, etc. IPES makes certain conclusions or assumptions; assumptions about erosion in "granitic" and relatively sandy soil types such as "Cagwin" or "Toem" soils; assumptions about slope and vegetation; assumptions about runoff potential; assumptions about primary "nutrient-loading" sources. These assumptions and others are the very subject of the attack by Mr. Kelly and his experts.

One final preliminary thought. The summaries which follow highlight the Court's recollection of key pieces of testimony. They are not meant to be comprehensive and are offered for context, not as findings. They are prone to human frailties of memory loss and limited recall, and they are probably specially deficient in a number of areas, particularly those involving science and mathematics.

For reasons which become clear later, not too much attention is given to testimony involving Mr. Kelly's investment decisions and realizations. Many of the sketches are very summary in nature, but it is hoped that they collectively show how this unusual case is now "at issue", to use legal parlance.

* * * * *

PLAINTIFF'S CASE

The first witness called for the Plaintiff, and declared an adverse witness, was MR. GORDON BARRETT, who has for many years been the Senior Planner for the Tahoe Regional Planning Agency. He traced his understanding of the history of the Uppaway development leading up to a subdivision site plan which he signed off on July 22, 1982. Mr. Barrett took

the position that the Federal Court decision which "deemed approved" Mr. Kelly's subdivision, did not exempt the developer altogether from compliance with existing and changing TRPA regulations. This was especially true, he felt, for any major changes in the coverage of the subdivision, such as changing the hilltop access from a funicular tram to a paved roadway. It was also his position that Ordinance 81-5 required the case by case review of the building plans for each of the individual homes to be constructed on the hilltop. Thus, applications to approve plans for houses differed, in his mind, from the already approved configuration for roads, curbs, gutters, etc. He denied any intent to single out Mr. Kelly's subdivision for harsh treatment during the application process.

* * * * *

Next to testify was Ernie Jones, who is a registered civil engineer with considerable experience in the Lake Tahoe Basin. Mr. Jones designed most of the drainage and erosion control measures for the Uppaway subdivision, utilizing Ray Smith's Report (Exhibit 39).

In Mr. Jones' design, hard roadway surfaces tilt inward toward specially designed infiltration trenches, working together with slope stabilization measures on both sides of the roadways. This design feature decreases the amount of siltation which might reach the Lake. The infiltration system itself was purposefully "over-designed" to protect against fifty year storm events, since the TRPA regulations at the time (and still) only required twenty year, one hour storm event mitigation measures.

On cross examination, Mr. Jones admitted that the accumulation of silt and sediment in the infiltration trenches and junction tubes would render the entire system less effective. Theoretically, both the top and bottom of the trench could eventually fill with relatively impervious material and cause the system to overflow. He stated that this phenomena could be avoided, however, by periodic

cleaning or replacement of the trapped sediments following inspections conducted at least semi-annually.

* * * * *

MR. RONALD W. TURNER, a professional land surveyor was called by Mr. Kelly to support his contention that some of the hilltop lots were repositioned for the primary reason that they would be placed on ground having a 30% or less slope, which Mr. Barrett had testified as being one of the four major criteria under the old Bailey land use capability system in force until 1982. In other words, the lots were relocated for environmental, not economic, reasons to show Mr. Kelly's sensitively to TRPA's concerns.

* * * * *

MR. ROBERT F. LAHMAN had known Mr. Kelly since 1976, in his engagement as the on-site manager of the subdivision. His tasks were to bring the project to completion, but he constantly encountered obstacles placed in the way of the project by TRPA staffers.

During one conversation with Mr. Barrett in 1980, he alleges that Mr. Barrett said "you will never build the hilltop". Later on, he sent a feeler out to Mr. Owens office, for the purpose of trying to start negotiations which would settle for all time a number of issues, including the relocation of some hilltop lots, the reconfiguration of some of the shoreline lots, or square-shaped building "envelopes", and the elimination of lots and other coverage which he felt would be attractive to the TRPA. The end result, he hoped, would be complete build-out, but these efforts never led to a binding and enforceable agreement.

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FROM THE DEPOSITION OF PAUL HOGAN:

Through a deposition transcript former Dan Walsh associated PAUL HOGAN testified, much like Mr. Robert Lahman,

that he was present during a meeting held on June 4, 1982, in the Ferrari law offices in Incline Village. He understood that the parties had reached an accord which would allow the permitting of the hilltop lots to be consented to by the staff of the TRPA, and he thought that recommendations for approval would go before the governing board on a Consent (uncontested) Agenda. The *quid pro quo* to TRPA for the approval of changes benefiting the subdivision was the elimination of lot 38 and the elimination of the funicular, as well as the other environmentally sound management practices. Because of the give and take on both sides, he fully expected that all procedural roadblocks to further development would shortly be removed, but, like Mr. Lahman, he was in error.

* * * * *

WILLIAM CODY KELLY:

William Cody Kelly testified that he was the principal trustee and sole life beneficiary of the Plaintiff Trust which was established in 1962. Mr. Kelly' family members are the remainder beneficiaries of the trust. In 1966, the Trust acquired 44 acres known as the Old Fleischmann estate, part of which was later transferred to Uppaway Development Co. The stock in the development company was then gifted to his children.

The parcel originally included three residences — the Fleischmann main house, the caretaker's house and the guest house. Prior to the purchase of the property, Mr. Kelly was concerned with his ability to recoup a $500,000 cash investment and employed Previews, Inc. as a consultant. That firm determined that a $500,000 to 1 million dollar profit could be reasonably anticipated if the property was further subdivided. Mr. Kelly moved into the main house in 1966 on a four month lease with option to purchase the property and lived in the house with his family until 1984.

In 1972 Kelly commenced to subdivide the lakefront property (phase 1). Raymond Smith was hired as a planning consultant. Exhibit 39 was submitted to TRPA in November of 1974. After several hearings concerning land coverage (excessive by Bailey standards), Mr. Kelly sought and obtained county approval. TRPA then sued Douglas County and the Trust. Judge Thompson granted a motion to dismiss because of some unique "deemed approved" language in the Compact mentioned earlier. TRPA decided not to appeal to the 9th Circuit and Mr. Kelly commenced his subdivision and improvements, hastened by his impression that a proposed ordinance might prohibit lakefront building, The lakefront building "envelopes" were on the market in 1977.

By then, the Uppaway Development Co. was formed and received title of 28 to 39 lots, and the Trust received stock in exchange for the 28 lots. Mr. Kelly retained title to 11 lots.

1977 marked the beginning of the development of Phase 2 — the middle tier or so-called "tennis court" lots.

Also in 1977, Judge McKibben (then sitting in the 9th Judicial District) allowed Douglas County to issue a permit for the repair work on the pier and the construction of a barbecue pit, over vigorous objection from TRPA.

In 1981, Mr. Kelly planned to develop the hilltop lots, the final phase. Mr. Jones updated the 1976 hilltop drawings and added a number of features, including a different sized infiltration trench and drainage system which accommodated flows from the rooftops of proposed residences. Offsite improvements (streets, trenches, etc.) for phase III were not built until 1982. After extensive discussion with TRPA staff, one hilltop lot was eliminated from the subdivision and some of the remaining hilltop lots were relocated to more level ground. Douglas County issued building permits in December of 1982. Kelly felt then (as he feels now) that his subdivision was exempt from emerging regulations.

In July of 1982 Kelly submitted applications for hilltop lots to a case-by-case review. He felt his applications would be expedited and easily placed in line for approval because of the give and take during the settlement discussions mentioned earlier. The TRPA, however, never acted on the applications, and over a year later, the Northern California District Federal Court Order and consequent moratorium went into effect. Mr. Kelly was truly disappointed by what he felt was TRPA's lack of good faith in failing to process his building permit applications.

After the moratorium was lifted, Mr. Kelly received IPES scores in the summer of 1988. He was again greatly exercised when he realized that building still would not be permitted on the hilltop.

Mr. Kelly feels that he has done far more than he was required to do under TRPA rules. He installed an expensive infiltration trench, removed the dead trees and planted 1500 new trees to absorb nutrition in the ground and prevent seepage into Lake Tahoe. During storms he feels that runoff will be captured and silt will cling to the drain rocks in his infiltration trenches. The cinder rocks will be taken out of the trenches every few years and cleaned.

The caretaker's house (lot 7) is owned by the Trust and is not for sale. William Kelly has no opinion as to the reasonable value of the lot. The guest house (lot 17) is on the market for $195,000. The Fleischmann House (lot 19) sold for 1.1 million and lot 22 sold for $522,500. Exhibit 30 shows the expenses he claims to have incurred on the construction of Hilltop - $169,006.22 in offsite expenses, plus approximately $81,000.00 in legal fees. Since all of the remaining lots were owned by the company; since the offsite costs for the remainder of the subdivision significantly exceed the revenues from lot 22; and since the Fleischmann buildings were there in the first place, Mr. Kelly feels that he has actually lost money on the subdivision by reason of TRPA's effort to thwart him.

* * * * *

One of the Plaintiff's two major expert witnesses was called on Thursday morning, February 8th. PROFESSOR CLARE N. MAHANNAH is a hydrologist and civil engineer with both a Bachelor's Degree and a Master's Degree covering subjects including plants and soils as well as water. He is a Professor at the University of Nevada at Reno and has conducted studies in the Tahoe Basin generally, as well as some studies and evaluations which are site specific to Uppaway.

It is Prof. Mahannah's opinion that with the type of "Cagwin" soil which is pervasively present in Uppaway, there is virtually no significant runoff or erosive potential, given normal weather conditions. In fact, it is his opinion that there is no runoff or erosive conditions in Uppaway even during extraordinary weather conditions such as a hundred year or more storm event.

Prof. Mahannah believes that the infiltration system totally diverts water from impervious surfaces in this subdivision. After testing portions of the system itself and having observed it for several years since 1983, Prof. Mahannah believes that no sediment will reach the Lake as a result of building out Uppaway's hilltop lots.

In examining the region he found that the vegetation is nutrient starved and it is his opinion that the vegetation will absorb any nutrient runoff from the upper section of the subdivision, as well as from elsewhere on the property.

His analysis of the non-erosive qualities of the Cagwin soil borrow heavily from field tests done in the nearby Logan Creek Water Shed area, where he and Douglas Guerrant, then a Master's candidate, conducted runoff experiments in the forest and on a dirt roadway.

Prof. Mahannah also attempted to impeach IPES. His primary criticism of IPES was that it fails to properly apply the Universal Soil Loss Equation (USLE) factors which

constitute a universally recognized standard to measure runoff. He stated that the TRPA has ignored two important features of the equation, one being a "C" factor (taking into account "cover" or vegetation) and the other being a "P" factor (taking into account owner management practices such as revegetation).

According to Prof. Mahannah, there is nothing fundamentally wrong with the USLE, with the possible exception that it wasn't really designed for a western United States forest. His major criticism of the way TRPA uses the formula is in its failure to utilize the two factors noted above. The first four factors "K" (soil erodibility), "R" (rainfall and runoff), "L" and "S" (lengths and slope of the ground) are, according to Prof. Mahannah, misleading without a "C" and "P" factor, because they assume a clean, tilled, fallow condition which is nowhere present at Tahoe.

Prof. Mahannah noted that the Agricultural Research Division scientists, who prepared the formula in the first place, have not revised the soil loss equation for natural forests so that instead of generating several pounds of sediment each year, lots such as those in Uppaway might generate an infinitesimally small amount of sediment. Under the revised formula, for example, the actual sediment loss for an individual lot might be only 2.78 times 10 to the minus 11th.

Much of Professor Mahannah's opinion is based upon field work he did along with Mr. Guerrant utilizing several versions of a rain simulator, predominately a device using a rainbird sprinkler, which is called the "M-3". On cross examination Prof. Mahannah admitted that the M-3 has received a great deal of criticism because of the uneven manner in which it disperses water in a given area and because it fails to take into account drop heights and kinetic energy factors which do contribute to runoff problems.

More specific testimony on the "M-3" and other simulators comes during the testimony of Douglas Guerrant, which is next revisited.

In addition to the rainfall simulation tests and the work which Prof. Mahannah did at Uppaway, Prof. Mahannah's private firm, known as WRD, undertook a study of five major water sheds in the Tahoe Basin, measuring these water courses both upstream, above any development, and downstream, below development near or at the Lake's edge. His conclusion, after taking measurements for forms of nitrates and phosphorus, was that the Tahoe Basin has developed a natural system of nitrification and denitrification which has not been interfered with to any great extent by development. His conclusion, which borrows heavily from Plaintiff's major expert, Timothy Durbin, is that most nutrients are deposited as a result of atmospheric conditions instead of as the result of disturbances in the various watersheds.

On cross-examination Professor Mahannah demonstrated some frailty in his understanding of TRPA regulations. For example, he did not know that the hydrologic area which is available for IPES Transfer Rights is larger than a single watershed and in the case of Mr. Kelly's lots, extends from Spooner Summit to Roundhill.

He also didn't know whether or not the Soil Conservation Service is now using the revised soil loss calculation formulas which apply to forest lands. Despite the storage capabilities of the Cagwin soil he has extensively studied, when that same soil becomes compacted, he admits that it is susceptible to a great deal of runoff and in certain instances, may even have a higher erodibility than does "toem" soil.

Further, in his study of five representative watersheds in the Tahoe Basin, his own figures do not conclusively prove the proposition that construction does not contribute to the nitrogen and phosphorus loading because in many of his own

field studies those values a[illegible] significantly increased below development.

* * * * *

The next expert called by Plaintiff was the soils man identified earlier, DOUGLAS G. GUERRANT, a hydrologist with a master's degree from the University of Nevada. It was basically Mr. Guerrant's research using several different rain simulator devices which was cited by Prof. Mahannah for the proposition that Cagwin soils are not very erosive. Each one of the four separate simulators, dubbed M1, M2, M3, and M4, had their own strengths and their own disadvantages form a research standpoint.

His conclusion, after utilizing these devices in Tahoe soil environments, was that Cagwin soils have a high infiltration capacity and a low erodibility factor. TRPA's Bailey system, which he disputes, concludes that the Cagwin soil has a modest erodibility factor on slopes between 0 and 15 degrees and a high erodibility factor on slopes above 15 degrees. Mr. Guerrant feels that the Bailey system has substantially over-estimated the erodibility of soil types in the Tahoe Basin and the influence of the slope on the soil's ability to infiltrate water and sediment, and for this reason, it is scientifically suspect.

On cross-examination, Mr. Guerrant admitted that none of the simulators that he had used have been used extensively before in a forested watershed except for the "M-3". He further admitted with certain qualifications relating to soil type, that it was true that the greater the slope, the greater the likelihood of erosion. The testing methods he employed were not run on any soil type other than those shown in his report, and some of his sediment calculations were made difficult to impossible because sedimentation either blocked or inhibited water running through hoses. Only on the "M-1" simulator was he able to derive data with which he was comfortable for sediment calculations.

He admitted that some of his data points on graphs were predicted according to a mathematical equation instead of representing actual field data. Finally, Mr. Guerrant conceded that there are limitations to the "M-1" testing for erosivity because the machine only produced 30% of the kinetic energy associated with a normal rainfall; that is to say, energy levels in rainfall sometimes play a role which he was unable to calculate.

* * * * *

MR. EDMOND NAPHAN testified on February 13th. He graduated from the University of California in 1941. Following a stint in the service during WWII, Mr. Naphan became the Chief Soil Scientist for the State of Nevada and represented the state in that capacity for some thirty years. His work included developing technical standards for the United States Dept. of Agriculture in quality controls and extensive field investigations. He was very familiar with the USLE equations for soil loss.

Under his direction, auger holes were bored into the soil on several of Uppaway's hilltop lots. The core samples were tagged and bagged and presented to him for evaluation. His analysis agreed in part and disagreed in part with the soils evaluation reached by the IPES team, at least during its first visit to lots 37, 47, 48 and 49.

According to Mr. Naphan, the procedure utilized by the TRPA in determining the "K" value for soils involves the auguring of only one hole, which he considers to be grossly deficient because of the variability of the soils groupings at a single hilltop location. In point of fact, he believes that a detailed analysis of the soils allows an expert to conclude not only that is it a mis-statement to characterize the soil groups as just "Cagwin" or "Toem", but also that new "K" values should be assigned to this particular type of soil. In the case of Cagwin-related soils, he feels that a .05 value should be utilized instead of a .2 value, and in the case of the Toem-related soils, a .02 value should be utilized instead of the .17

value used by the TRPA. He also feels that the TRPA failed to take into account the amount of organic material present in the soil.

In summary, he feels that there is very little runoff potential for the Plaintiff's lots. In fact, what little runoff might be occasioned by an extraordinary storm event would be easily handled by Mr. kelly's infiltration system. In other words, Mr. Kelly should not be denied a building permit for any reason relating to the erodibility of the soil of his hilltop lots because that soil is not very erosive.

Mr. Naphan's testimony was the final piece in the Plaintiff's backdrop. The stage was now set for the expert whose testimony was the most coalescing and certainly the most wide-ranging of any at trial, Timothy Durbin.

* * * * *

THE DIRECT TESTIMONY OF TIMOTHY DURBIN:

Mr. Timothy Durbin is the former director of the U.S. Geological Survey in Nevada and California. His work for USGS at Lake Tahoe included nutrient and soil transport, steam flow erosion control, sediment sources, land studies and related disciplines. The Court declared Mr. Durbin an expert in Hydrology (being for these purposes the study of water and how it occurs and moves through the environment).

According to Mr. Durbin, there are about 100 tributary watersheds of various sizes discharging into Lake Tahoe. The yields of sediment, that is, the amount of sediment that is derived from the watersheds and into the lake, is expressed by weight: "tons per year." Similarly, nutrient yield from the watersheds into the Lake is also expressed by weight: "tons per year" or "kilograms per year." Hill slope erosion and stream channel erosion constitute two of the primary ways for sediments and nutrients to be discharged into the Lake.

Mr. Durbin relied in part on the "Nolan Sediment Sources Study", involving four watersheds [Blackwood Creek, General Creek, Edgewood Creek and Logan House Creek], for the proposition that channel erosion may account for somewhere between 65% and 90% of sediments reaching the Lake. Mr. Durbin also testified that there was no showing in the study that development had any measurable affect on channel erosion. He concluded that sediment yields from channel erosion is due primarily to natural causes. Mr. Durbin testified that road cuts in some locations do contribute to sediment into the lake, but he feels that they are not a primary source.

As for nutrients, (mostly nitrogen [N] and phosphorus [P], Mr. Durbin testified that basic in-put of N and P to watersheds comes from rain and snow fall (in other words, from the atmosphere). The two pathways are: (1) run-off into the streams; and (2) infiltration (ground water pathways). Also, nutrients fall directly on the Lake. In addition to these "wet falls" are "dry deposits" or dust and other dry particles that fall upon the watershed.

The four possible "fates" of nutrients once they reach the Lake Basin are as follows: (1) nutrients can be stored in the water; (2) nutrients can be stored within the algae; (3) nutrients can be deposited to the bottom of the Lake where they settle; and (4) nutrients can be discharged into stream flows [i.e., the Truckee River] out of the Lake.

What happens when nutrient flow is increased? Mr. Durbin hypothesizes a "steady state" condition, where the inflow of nutrients into the Lake is balanced by the outflow, i.e., there is an equilibrium achieved with the same mass of N and P coming in as is going out. Of course, there will always be seasonal variations and yearly variations, but if the trend is constant, science can say that there have been no "storage changes." *See Exhibit* 5-14, which shows increasing inflow of N and Mr. Durbin's notion of equilibrium. Storage of N would increase over time with,

perhaps, a new steady state to be achieved some time in the distant future.

Mr. Durbin testified that the present state of the Lake is one of "transition". It has departed from a steady state and is moving toward a new steady state — one that will have a greater N weight. According to *Exhibit* 5-13, it is unclear what is happening to the Lake regarding P; in other words, Mr. Durbin can't predict a distinct trend.

Increase of nutrients means that as mass increases, concentrations will increase; algae is increasing in response and water clarity is going down. By way of contrast, Durbin feels that sediments have no long term affect on water clarity as sediments ultimately settle to the bottom of the Lake. Moreover, he opines that sediments tend to accumulate at the mouth of the stream, and in sharp contrast to TRPA/ California experts, he feels that sediments do not bring N into the Lake. Mr. Durbin's entire thesis, which is examined more fully in the First Discussion Section is based on "Budgets". A "Budget" is a listing or accounting of the source of inflows, outflows and a statement about the fluctuating rate. Budgets tell us the magnitude of the process and what is important about the behavior of the system.

According to Mr. Durbin, his budgets disprove the efficiency of "IPES", *see Exhibit* 5-28, the purpose of which is to protect and/or enhance water quality of the Lake by a system of land development regulations involving a scoring system. In Mr. Durbin's opinion, the IPES score is not related (or cannot be related) to erosion, nor can the score be related to sediment yield. Moreover, cultural influences on sediment yield are small as he feels that development generates very little sediment. According to the monitoring program at Incline Village done in the 1970's and then in early 1980, sediment yield was high shortly after development took place but was low ten years later. According to Mr. Durbin, even though there was an increase in sediment caused by development, there was a "healing process" that

subsequently brought sediment yields back to what they were prior to development.

Only seven watersheds constitute the basis of the USGS watershed studies at Lake Tahoe, (*see Exhibit* 5-4) but they represent 50% of the water going into the Lake. From studies on and monitoring of these watersheds, Mr. Durbin feels that he can demonstrate mathematically that development contributes a small portion to the 24,000 tons of sediment that reaches the Lake per year while the rest is associated with other processes occurring in the watersheds. Mr. Durbin makes assumptions from Vail maps and street maps that depict road ways and then he correlates these "improved" areas to areas of cultural sediment yield: total area = 38 sq. miles of development; total sediment yield = 24,000 tons per year; the conclusion being that only 13% of sediment yield can be associated with development (3,000 tons per year) while the rest (21,000 tons per year) is caused naturally in the watershed, deposited from watersheds having little if any development.

Having thus handled sediments, Mr. Durbin turned his attention to nutrients. Are nutrients associated with erosion? Mr. Durbin feels that they are not, because N is not in his opinion related to sediment yield.

His conclusion, which he restates many times in many ways through his various budgets, is that development watersheds have little impact on reducing the overall quality of the Lake.

He concedes that nitrogen is increasing dramatically in the Lake. One of his predictions is set out in *Exhibit* 5-17. He sees the Lake in balance in the late 1950's and early 1960's. Due to increasing atmospheric deposits on the Lake surface (wet and dry fall) Nitrogen is increasing and will work to a new "steady state" — nitrogen up by four times. Nitrogen levels are now about 15 parts per billion and by the year 2300 will be 42 parts per billion if development continues versus 40 parts per billion if development were to stop,

according to Mr. Durbin. In other words, development generally, and residential development in particular, simply cannot be viewed as a major culprit associated with nitrogen-loading because it plays such a fractionally small role.

Mr. Durbin used *Exhibits* 5-30 and 5-31 to illustrate his opinion as to the source of increased nitrogen which he blames for the greatest part on *atmospheric transportation from the urbanized coast* of the Northwest.

Finally, Mr. Durbin gave the Court a synopsis of his research of the logging history of the Tahoe basin to illustrate his contention that further development will have little impact on the Lake's quality. Mr. Durbin feels that the case studies of Dr. Goldman, Dr. Byron and others have helped to prove that all the land disturbance caused by late 19th Century logging had no effect on the Lake. Again, if ground disturbance is not the cause of increased nutrients into the water, the *atmosphere* must be the source.

The stage was then set for the mathematical models which Mr Durbin used to establish his nitrogen and phosphorus "Budgets". These budgets are reviewed in some detail in the First Discussion Section, but for now, his preliminary conclusions are worthy of note.

As for nitrogen into the Lake, Mr. Durbin concluded that 9% comes in via streams, 6% from "cultural activities"; and 85% from the atmosphere. Regarding phosphorus, Mr. Durbin concludes that 55% comes from streams, only 6% from "cultural activities", and 39% from the atmosphere.

In short, according to Mr. Durbin: (1) development produces very little sediment; (2) sediment contains very little nitrogen; (3) the majority of the Lake's nitrogen arrives via rain, snow and dry-fall landing on the Lake; (4) development at the lake is not the cause of water clarity problems; (5) IPES is faulty because it can not be justifiably related to its purpose.

Because Mr. Durbin's testimony is such a key to Plaintiff's case, a separate section is devoted to his Cross-Examination.

* * * * *

CROSS-EXAMINATION OF MR. DURBIN

On Cross Examination, Mr. Durbin admitted that a number of his conclusions were confirmed by him after his November deposition was taken. He also admitted that the numbers which he allocates to such important factors as nitrogen loading, have changed since the time he appeared before a legislative oversight committee. At the time he testified before the sub-committee, he offered the opinion that the total load of nitrogen was some 135 tons, whereas the figures he now uses are 56.1 tons for atmospheric loading and 9.8 tons of streamloading. He admitted also that initially he did no calculations for ground water loading of nitrogen and primarily discounts its effect. Moreover, his studies concentrated on dissolved inorganic nitrogen and soluble reactive phosphorus, and he did not take into primary account any accretions in the amount of nitrogen or phosphorus caused by organic materials.

His study did not take particular account of the fact that the rainfall levels vary in different "contours" of the Basin, although he feels that doesn't make much of a difference to his overall calculations.

He feels that core samples which arguably lead to the conclusion of increased sediment occurring after 1960 should be re-examined for the plausible hypothesis that a great deal of mixing among the sediments has occurred on the top layers of the core samples, thus invalidating the conclusion reached by others that sediment loading has been increased by recent development.

He admits to not subjecting his nitrogen and phosphorus loading analysis to the rigors of standard error studies nor to individual regression co-efficients, but (after reflecting on the matter overnight) he was able to subject his figures to what he called a "sensitivity" study. This study showed variances of his nitrogen estimates which could lead to plausible error of plus or minus 1.9 tons per year and as to phosphorus, plus or minus .3 tons per year. This changes nitrogen and phosphorus contributions by several percentage points.

For example, under his Exhibit 59, if the atmospheric contribution to nitrogen loading is 42.8 tons rather then 56.1 tons, then the effect of development equal 9% and not 6%. Under Exhibit 64, if the atmospheric loading of nitrogen is added to a figure for ground water loading of nitrogen and the out-flow at the Truckee River is changed to 3.8 tons, then the effect of development is as much as 16%, according to these revised calculations.

The area where Mr. Durbin showed perhaps the least amount of knowledge and training had to do with the details of atmospheric migration and deposition. He admits that he did not plot any wind trajectories coming from California, nor had he subjected them to any kind of a systematic study over time, even though he claims that the single most important contribution of nitrates comes from the Sacramento and San Francisco area to the west of Lake Tahoe. His overall opinion, however, does not change. According to Mr. Durbin, atmospheric contributions of nitrogen and phosphorus are far more important than all other sources of algae-forming nutrients. Particularly insignificant is the contribution of residential development. Most infinitesimal of all are the contributions from Mr. Kelly's engineered subdivision.

* * * * *

Two witnesses testified on the afternoon of February 21st. The first was RAYMOND M. SMITH, a professional

planning consultant who undertook his undergraduate work at Stanford and received a Master's degree from Harvard University. With extensive service in Northern Nevada, Raymond M. Smith was the first planner for the State of Nevada, and he is the author of Exhibit 39, which is the report that details Mr. Kelly's planned unit subdivision in Uppaway. It was prepared in 1974 and submitted to the Federal District Court for the District of Nevada prior to that Court's order in October of 1975.

Mr. Smith does not fully understand the new IPES regulations despite his extensive credentials and feels that the TRPA should operate for the benefit of the public by opting for mitigation measures which would allow further building. In fact he feels that Article II(D) of the Compact requires such mitigation measures.

On cross-examination he admitted that the IPES system is more site specific than the Bailey system that preceded it.

* * * * *

The second witness was MR. FRED DANIELS, JR. Mr. Daniels is a consulting mechanical engineer with degrees from UNR-Reno, and he served for several years as the Chairman of the State Board of Professional Engineers.

After examining the credentials of some of the IPES team members, Mr. Daniels feels that they are distinctly underqualified to do the work they are called upon to do by the TRPA. Worse yet, he feels that the performance of the work by those unqualified persons represents an illegal act under Chapter 625 of Nevada Revised Statutes. The Court, however, held that the Federal law pre-empted the issue and that the Compact permitted the TRPA staff to conduct work pursuant to the Compact without complying with the registration provisions of Chapter 625.

* * * * *

On the morning of February 22, 1990, STEVEN R. JOHNSON, an MAI and SREA qualified real estate

appraiser, was allowed to offer limited opinion testimony regarding the value of Plaintiff's hilltop lots.

He formulated an opinion as to values in 1982, prior to the enactment of the revised plan and after the development of the revised plan. He also had opinions as to value in 1989, including a value of the lots following the amended IPES scores.

Those valuations are as follows:

1982 Prior to the Plan:
$566.250.00

1982 After the Kelly Plan:
$815,000.00

Before the IPES appeal in 1989:
$555,000.00

In 1989 after the IPES appeal:
$622.020.00

Mr. Johnson also testified that the total retail sales of lots within the Uppaway subdivision to date has produced gross sales in the amount of $5,236,000.00. There is an additional preliminary unsold mid-level inventory of lots on Kelly Circle having a value, he feels, of $710,000.00.

And that, with some reservations, summarizes the Plaintiff's case.

* * * * *

DEFENDANT'S CASE

On the afternoon of February 22, the TRPA chose to call DR. CHARLES GOLDMAN, perhaps the world's leading expert on Lake Tahoe, as its first witness. As a "limnologist" or an inland lake ecologist, Dr. Goldman has studied the Lake and its environs since 1959. He helped

formulate the Tahoe Research Group which has a series of on-going studies at the Lake. His division of environmental studies at the University of California-Davis is one of the participating agencies in the Tahoe Research Group and the interdisciplinary assessment team.

According to Dr. Goldman, Lake Tahoe is in many ways unique among the large lakes of the world. It has a relatively small watershed when considering its surface area and volume, so much so, in fact that it would take 700 years to replace the water if Tahoe were drained. Because of this feature and because of its relative infertility, sediments and other materials finding their way into Lake Tahoe stay there for a very, very long time.

Dr. Goldman's studies indicate that there has for several years now been a 5 1/2% increase per year in algal growth at Lake Tahoe. He feels that measurements and studies which have a duration shorter than five years are inconclusive and misleading because of tremendous inter-annual variations caused by differing volumes of rainfall and other climatological variations. Using a recognized procedure to measure the transparency of Lake Tahoe, he concludes that currently, Lake Tahoe is losing about 1/2 a meter a year of its transparency primarily due to algal growth, with over 100 algae species appearing in the Lake, sometimes at different times. As with Timothy Durbin, many of Dr. Goldman's opinions are digested later in the First Discussion Section.

For now, in the briefest summary, Dr. Goldman feels that without base wide controls for erosion, and indeed, without controlling development itself, many of the unique qualities of Lake Tahoe will be lost forever.

On Cross-Examination, Dr. Goldman conceded that airborne deposition of nutrients may exceed the nutrient discharge from the combined effects of streams and ground water, at least during certain years. Only recently have scientists realized the role which is being played by organic components of nitrogen and phosphorus.

He admitted that the studies which have been performed at Lake Tahoe have not concentrated upon the role played by the development of single family residences. Moreover, Dr. Goldman and his colleagues were surprised when their core studies of sediment from the bottom of the Lake did not disclose a spike in the amount of diatoms showing increased algal production at the time the basin was disturbed by logging activities in the late Nineteenth Century.

Dr. Goldman also admitted that scientists as yet don't know the full extent of natural versus cultural loading of nutrients into the Lake, but he emphasizes that very small amounts can play a disproportionate role because they interfere with the Lake's historical equilibrium. Because of this feature, he feels it is misleading to simply assign straight percentages for the contribution of man-made disturbances which in small increments may play a critical role in the overloading of the ecosystem. More on this later.

* * * * *

The former United States Forest Service supervisor, MR. WILLIAM A. MORGAN, became the executive director of the Tahoe Regional Planning Agency in the Spring of 1985. Because of the pending litigation in the Federal District Court in Sacramento, this was, he felt, one of the most troubled periods during the history of the TRPA.

Mr. Morgan traced his understanding of the history of the TRPA, starting with the so-called "1980 Plan" which was prepared in 1964 and given the later dated in its title because the authors had certain ideas about how they wished the Lake to appear by the year 1980, as mentioned earlier in the history section.

Mr. Morgan was, perhaps, the driving force in the consensus building workshops which led to the agreement and the stipulated settlement of the Federal Court litigation. He felt that the new goals and directions of the TRPA, including what he called "the curing capacities" of the Lake Basin,

have been incorporated into the 1987 ordinances and the 208 Water Quality Plan.

Mr. Morgan feels that the IPES rating system, which to a great degree also bears his personal stamp, not just directly limits growth of residential development through planning, but also indirectly manages other environmental thresholds, which he feels to be a proper by-product of IPES.

He feels that the IPES system is superior to the Bailey system because it recognizes the importance of field investigations to determine true land capabilities, and because it far more specifically evaluates individual parcels than does the old Bailey system.

He sees the so-called IPES "line" of demarcation, which is the threshold score permitting or precluding construction, moving down as the inventory of sensitive lands in the Basis begins to shrink. He also feels it is appropriate that the most suitable lots for building are those which are first allowed building permits; in other words, they are the less-sensitive parcels.

In Mr. Morgan's opinion, it is not necessary to have licensed engineers and surveyor as members of the IPES team as properly trained technicians, including a soil scientist, a hydrologist, and a planner, are more than sufficient to serve the TRPA and the public in implementing the IPES rating system.

During cross-examination Mr. Morgan stated that there is no credit given for offsite mitigation prior to an IPES evaluation. Nor is there any provision he knows of for raising IPES scores by onsite mitigation measures employed by the landowner.

He further admitted that there is a possibility that the IPES line may never move downward so as to free low scoring lots for development. Finally, he conceded that IPES doesn't seek to measure post-construction impact.

Concerning the universal soil loss equation, Mr. Morgan acknowledged that the TRPA version of the formula does not utilize either the "C", "cropping" or "coverage", factor or the so-called "P" factor which has to do with onsite mitigation measures and practices.

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The defense then called another limnologist and noted Lake Tahoe Research Consultant, DR. EARL R. BYRON, who was awarded his doctorate at the University of Colorado at Boulder. Dr. Byron has been doing a great deal of post-graduate research work with Dr. Goldman, particularly with respect to what he calls "the food web" at Lake Tahoe. Since 1983 he has been in charge of the interagency monitoring program (LTIMP) at Lake Tahoe.

Dr. Byron feels that it is highly inappropriate in a complex ecological system to use simple mass balance analyses such as those employed by Mr. Durbin. He feels that the whole system of transformation of nutrients involves the take up, the decay, the sedimentation and the release of nitrogen, in ways that do not lend themselves to a mass balance understanding. Phosphorous, too, undergoes transformations, and though it is in shorter supply than nitrogen, it can be even more devastating to the Lake because it can be stored and is strongly associated with particles and with sedimentation. And because it often appears in a particulate form, he feels that Mr. Durbin's utilization of soluble reactive phosphorous as a measuring device, is again inappropriate.

Dr. Byron stands by the scientific validity of his sediment core studies which are mentioned, among other places, at *Exhibits SSSS-8 and -11*, and he feels that the core studies tend to show that development does play a significant role in the eutrophication of the Lake. He feels, with the care that was taken in capturing and analyzing the core samples, that there is very little possibility of results being confused by reason of near-surface "mixing" of the sediment materials.

He also feels it was inappropriate for Mr. Durbin to employ a simple regression technique using the sediment core data because, by projecting outside the date base, he failed to demonstrate the wide statistical variance having extremely disparate upper and lower confidence levels. Dr. Byron feels that IPES is rationally related to its purpose of controlling water clarity.

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MR. FRANK W. DAYKIN, for many years the legislative counsel for the State of Nevada, was called out of order by the Plaintiff for the purpose of highlighting certain aspects of the Compact itself, as well as its legislative history, cf. NRS 277.200. Mr. Daykin feels that in the early 1980's, the TRPA acted against the will of the Nevada State Legislature in limiting the number of building permits that should have been issued to Douglas County. He also feels that the TRPA contravened Nevada law by interpreting the Compact so as to interfere with the rights of certain land owners to proceed to construction of single family residences while the final Tahoe Plan was being hammered out.

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DR. THOMAS A. CAHILL was called by the State of California and the TRPA as an expert on atmospheric effects at Lake Tahoe. Dr. Cahill comes from the Dept. of Physics at the University of California at Davis and since 1970 has done extensive work in using nuclear physics and in using cyclotrons to analyze air pollution. He has authored some 140 articles on related subjects.

He, too, agrees that Mr. Durbin's mass balance approach is inappropriate because he feels that Mr. Durbin was unable to measure some of the components which go to make up the mass balance formula. That is to say, an approach which relies on statistical interferences rather than data may be misleading and scientifically invalid.

Even for those parameters where data was available, he feels that Mr. Durbin utilized misleading data. For example, the atmospheric deposition measurements for the Ward Creek watershed are misleading because Ward Bench has one of the highest rainfalls at Lake Tahoe. Had Mr. Durbin been sensitive to the contour studies of rainfall at the Lake, he might have come up with some 36 tons of nitrogen loading as opposed to some 56 tons.

Dr. Cahill launched into an extensive explanation of the complex features of atmospheric deposition of nitrogen and phosphorous at the Basin. Dozens of combinations exist, because these nutrients can be deposited through a dominant wet deposition process such as snow, rain and cloud water or fog, or, in dry deposition through gases, fine particles and course particles. Not only in the form of nutrient deposits widely varying, but so too, are seasonal variations from the summer to the winter months as well as the amount of relative precipitation.

Dr. Cahill feels that Mr. Durbin has little scientific support for the hypothesis that the problems at Tahoe are strongly associated with urban development in the Sacramento had Bay areas. Dr. Cahill's studies show that most of the storms that arrive at Tahoe come from the Northwest to the Southwest over water and air sheds in the North Pacific region which contain some of the cleanest air in the world. In fact, he feels that it can be demonstrated that there has actually been a decrease in NO2 concentrates in the Sacramento and Bay areas between 1959 and 1989, although these gains may be offset by the increased amount of traffic in the Tahoe Basin during that same period and, especially in the winter months, by ground up resuspended dirt on roadways.

After a complex evaluation of the transformation of nitrogen, the reactive nature of nitrates and the deposition of ammonium nitrate, together with the seasonal variations mentioned earlier, and atmospheric inversions and

windflows, Dr. Cahill discounts the role of out-of-basin sources for the airborne deposition of nitrogen. He feels that course particle nitrogen from a massive biological sources, play a much more significant role. He acknowledges that no systematic studies have yet been done which show the comparative contribution of organic course particle nitrogen with other forms.

Dr. Cahill feels that scientists are getting much closer to understanding the immensely complex process of nitrogen and phosphorous deposition, transformation and recycling at the Lake, but he feels that the TRPA is, nonetheless, on the right track by controlling growth and development on high hazard parcels of real property.

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On February 27th the current Executive Director of the Tahoe Regional Planning Agency, DAVID ZEIGLER, was called by the TRPA for the purpose of describing monitoring programs in the Basin, cause and effect relationships, controls standards, programs and measures. During his tenure, he has made sure that the TRPA is an active member of the Lake Tahoe Interagency Monitoring Plan (LTIMP), and corroborating the statements of Drs. Goldman, Byron and Cahill, Mr. Zeigler pointed to the dramatic increase in algal growth in the Lake and in its tributary streams. In fact the streams themselves, as well as the Lake, have been in frequent violation of water quality standards and guidelines published by the Federal Government, and by California and Nevada.

As did Dr. Cahill before him, Mr. Zeigler talked about the Tahoe watersheds in their natural state as producing an efficient system for stripping nutrients and holding them. He also described the complex nitrogen cycle that takes nitrogen gas from the atmosphere, converts it to nitrates which then precipitate and are absorbed by both plants and animals, eventually finding their way into debris. Exposure to bacteria converts the nitrates to ammonium nitrate, organic

compounds and ammonia. Finally, they are converted back into nitrate, with dangerous runoff potential occurring at the front, middle and back ends of the system.

In Mr. Zeigler's opinion a properly designed infiltration system, such as the one located at Uppaway, can minimize, but will not eliminate, the impact of nutrient-loading.

Mr. Zeigler described the evolution of the 1974 Bailey Lane Classification Guide for Planning, its former coefficients and its lingering vitality in the IPES program. He points out how the relative erosion hazard and runoff potential categories for IPES, in effect, both compliment and, in a way, supplant, the Bailey system as it relates to the calculation for allowable land coverage. Whereas the Bailey system drew lines with a broad brush, so to speak, and allowed land coverage in categories 1 through 3 of between 1 and 5% only, the IPES program allows for a "curve" instead of a "stairstep" approach. Therefore, even those persons whose land falls in a category 3 Bailey Land use allowable coverage category may, depending upon their erosion hazard and runoff potential score, cover their land with impervious surfaces to a degree somewhere between 5 and almost 20%, unless, of course, the lot itself was inside a planned unit subdivision, like Uppaway.

In the case of planned unit parcels, the calculation takes into account factors for gross acreage. In Mr. Kelly's case, even if his IPES score was theoretically high enough, he would still be limited to the 2500 square feet depicted on the subdivision map.

In addition to his description of IPES procedures, Mr. Zeigler talked about soil conservation and anti-degradation policies which are consistent with the published environmental thresholds of the TRPA and with the Federal Water Quality "208" Plan. In fact, he feels that the environmental threshold (and in another sense IPES itself) are ways which allow numerical parameters to be assigned to what would otherwise be difficult to enforce.

Mr. Zeigler also explained his understanding of Best Management Practices such as drainage control and revegetation. As desirable as Best Management Practices are, he feels they are only as good as the care and maintenance which are given to them following their installation. He retains a long range concern for all such amenities, including and especially those installed by Mr. Kelly in the Uppaway subdivision. Management practices basin-wide, he states, are nowhere near as effective to maintaining Tahoe's balance-state as are natural conditions.

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Another Consulting Hydrologist whose background and training are heavily weighted in favor of statistical measurements, is MR. DAVID DAWDY. Mr. Dawdy's testimony has a tendency to rebut the Guerrent thesis, in the following particulars.

Mr. Dawdy feels that slope is a much more important variable than does Mr. Guerrent. He thinks that Mr. Guerrent's report of sediment yields as high as 1 to 28 (expressed in parts per thousand), or 1,000 to 28,000 (expressed in partes per million), actually proves a very high, not a low, sediment rating. Mr. Dawdy was also asked to critique the Hill and Nolan report (Exhibit SSSS-5), which was relied upon in part by Mr. Durbin. Mr. Dawdy feels that the Hill and Nolan report impeaches itself because the authors failed to take into account their own data from two other streams on the east shore of the Lake. Had they done so, Dawdy thinks they would have realized that some of their morphological conclusions were faulty.

Finally, Mr. Dawdy joined the other defense experts who criticized Mr. Durbin's use of regression equations to make predictions, without implementing rigorous confidence-level standards at the same time.

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FLORENCE LIVINGSTON'S curricula vitae shows him to be a pre-eminent city planner. With degrees from Stanford, Yale Law School and MIT, Mr. Livingston has been involved in major plans all over the country. Having carefully examined the 1987 Tahoe Regional Plan, it is Mr. Livingston's opinion that the techniques which are incorporated into the Plan are not only proper techniques for environmental threshold carrying capacities, but they represent systematic, logical, unbiased and scientifically based standards. Mr. Livingston has participated in the development of plans in Menlo Park, Los Angeles, San Francisco and Florida, where the conceptual framework is not at all dissimilar to the format of the 1987 Tahoe Plan. Greater treatment might properly be given to his opinions here, but Mr. Livingston basically invade's the province of the Court in reaching his conclusions about the sturdiness of the legal cornerposts for IPES.

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MILT SHARP, Civil Engineer, was called by the defense and taken out of order (once again for scheduling reasons) to traverse Mr. Kelly's claims about the size of the direct expenses he sustained in developing Uppaway. According to Mr. Sharp's analysis, (*see* Exhibit J) Uppaway improvements, including such matters as surveying, bond premiums and the like, produce a total cost for phases I and II (the Lakfront and Tennis Court lots) of $25,193.00. For Phase III (the Hilltop) the figure is $24,888.00.

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DR. ROBERT COATS, a Consulting Hydrologist with expertise in the nutrient transports in alpine watersheds, testified that Mr. Kelly cannot "improve on nature" with his infiltration system and mitigation measures. He feels that such a system does not cleanse certain forms of nitrogen that may migrate through the subsurface in solution with ground water. Further, the disturbance from construction inhibits the "duff" zone on the floor of the forest. This organic layer,

which is a few inches thick at the soil surface, is perhaps the most efficient zone for nitrogen uptake and certainly more important than the uptake at the depth where the infiltration system may deposit nutrients. Like Dr. Goldman, Dr. Coats feels that Mr. Durbin errs in considering just the soluble reactive fraction of total phosphorous loading (*see* Exhibit Z-50). Like Dr. Byron, he feels that Mr. Durbin ignores transformation processes of both nitrogen and phosphorous. Like both of them, he knows that the dominant form of nitrogen is organic nitrogen. And, like all the defense experts, Dr. Coats feels that Mr. Durbin seriously underestimates the impact of land development and disturbance on deposition of total phosphorous and organic nitrogen.

In Dr. Coats' opinion, Mr. Durbin's statistical regression analysis is so seriously flawed that one should not give much faith to the conclusions drawn. Stanford Standard Competence and Significance testing shows that there is a 50% probability that Mr. Durbin's regression analysis means nothing at all. Obviously, the 95% confidence rating, which scientists are used to, is not present in Mr. Durbin's analysis or in his nutrient budget; therefore, he feels, decisions cannot be based on such inexactitude.

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Wednesday, February 28th, saw the testimony of KENNETH FOSTER, a consulting civil engineer licensed in both Nevada and California. He was a member of the Board of Directors of the Sierra Preservation Council, and he was a key member of the technical advisory committee for the Consensus Building Workshop.

He described the complex and tedious process of developing the technical base for the IPES procedure over a period of more than two years. He described in detail each of the 9 IPES elements and the rationale behind the scoring procedure, particularly the conversion and use of the universal soil loss equation and the runoff potential which together account for 650 of the 1150 available points.

For "conservative" reasons the Technical Advisory Committee decided not to use the most recent soil service category for the Cagwin soils that predominate in the Tahoe Basin. They elected instead to use the older Rogers' report, which assigns a lower runoff potential category and a commensurately lower IPES score to this component of the evaluation. He acknowledged on cross-examination that this scoring decision was made for policy as much as scientific reasons.

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Also testifying on the 28th was attorney KENNETH ROLLSTON, who, along with Mr. Owens, was the attorney for the TRPA during the time when amended plat maps for Mr. Kelly's subdivision were prepared. Following the Federal Court approval of the subdivision, Mr. Rollston discussed the import of certain correspondence he had sent or received, particularly Exhibits A-4, I-5 and I-13. The latter two documents contain acknowledgements on behalf of the TRPA that ordinances that might otherwise prohibit building at Uppaway have had no application to the "deemed approved" status of the Uppaway subdivision by virtue of Judge Thompson's Federal Court Order. These exhibits and their legal import are more carefully reviewed in the Third Discussion section.

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DR. ROBERT TWISS is a noted landscape architect and an environmental planner. He is former Chief of the California-TRPA and was a member of the Technical Advisory Committee during the creation of IPES.

From his direct involvement and from the research he has done, Dr. Twiss feels that he is in a unique position to trace the history and the environmental planning at Lake Tahoe commencing with the grant from the Fleischmann Foundation in 1957. These efforts eventually resulted in the final advisory plan, dubbed the "1980 Plan", which was published

in 1964 but was rejected by Washoe County and so ended the period of what Dr. Twiss calls the "pre-planning" efforts.

The next "era" for the Tahoe Regional Planning Agency started in 1967 and ran through 1972. During this period of time, development was controlled by counties because a region-wide plan was not in force. Recognizing the imminence of restrictions on the growth of subdivisions by the implementation of a regional plan, developers took advantage of this hiatus in regional planning and during 1970 created 4,134 lots. In 1972, 4223 more lots came into existence. In total, during the time when the Tahoe Regional Plan was in the process of preparation, 14,684 lots came into being in the Tahoe Basin. Many of these lots represent the 12,000 vacant lots which are still in existence and affected by "IPES".

Dr. Twiss thinks that some of these subdivisions are "antiquated" because they were approved prior to the adoption of protective measures and because, he feels, they do not adequately address environmental concerns.

In his role as a member of the Technical Advisory Committee, Dr. Twiss was one of the architects of IPES, so he naturally approves the specificity with which IPES measures individual building sites. He does not feel that IPES is a growth control measure, but on cross-examination, he admitted that if the line does not move downward in the near future, then IPES will have the same effect as would a growth control measure.

Dr. Twiss wishes to place the Uppaway subdivision in the context of the enormity of the problems facing regional planners at the Lake when it comes to understanding how long it has taken to address the problems of the Uppaway subdivision, being just one subdivision among many. The planning agency had to cope with thousand of lots over the same period.

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The final two defense witnesses were Gordon Barrett, who testified earlier, and Dr. Thomas Dunne.

GORDON BARRETT was briefly recalled to refute the statement attributed to him by Mr. Lahman. Mr. Barrett states that he never told anyone that Mr. Kelly would "never build the Hilltop". Mr. Barrett also reviewed Mr. Durbin's study of developed areas in the basin and offered the view that because Mr. Durbin used some old maps, there are significant developed areas both on the North Shore of Lake Tahoe and on the South shore, particularly at the downtown casino core and up along Kingsbury Grade, which Mr. Durbin had simply failed to account for in his calculations. Therefore, Mr. Barrett feels that Mr. Durbin's conclusions were placed in further disrepute.

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DR. THOMAS DUNNE from the University of Washington, Dept. of Geological Sciences, was called by the defense as an expert on pathways of rain and snowmelt runoff from steep soil in forested areas which was the subject of his doctoral thesis at John's Hopkins Univ. in 1969.

Dr. Dunne describes four paths which runoff takes in places such as Uppaway:

1. Overload flow, or so-called "Horton" flow, which occurs when rainfall intensity exceeds the infiltration rate;

2. Water which percolates through grus into bedrock and slowly migrates downhill (relatively deep ground water runoff);

3. Shallow subsurface flow as ground water; and

4. Saturation exfiltration overland flow, where the near surface water has become so saturated that it percolates back to the surface for overload transport.

Like many defense experts before him, Dr. Dunne talked about the fact that surface water can carry organic particles as well as dissolved forms of nutrients. He offers the view

that any ground disturbances taking place near the protective or "armored" layer near the surface replenish the supply of erosive materials.

From several perspectives he questions the validity of Mr. Guerrant's study and opinion. First, the M-3 and M-4 simulators, he feels, simply don't simulate rainfall very well. While the M-1 and M-2 are acceptable simulators, he feels that the infiltration data which Mr. Guerrant developed doesn't prove Mr. Guerrant's conclusions. He feels further that Mr. Guerrant raked the upper two inches of the soil to attempt to represent disturbed conditions, but this kind of disturbance actually increases the infiltration capacity of the soil. More typical construction efforts, such as soil compaction, actually inhibit infiltration characteristics of Cagwin type soils. He concludes that Cagwin soil is a soil of high erodibility and thinks that Mr. Guerrant's thesis wholly fails to disprove this conclusion. He further feels that had the Guerrant thesis been based upon a sufficient number of replications, the conclusions might well have been very different. In effect, he asks the Court to discount altogether the soil studies done by Mr. Guerrant and his adviser, Clare Mahannah.

Dr. Dunne also critically reviewed Mr. Durbin's claim that the bed and the banks of streams bring (or transport) the great majority of sedimentation to the Lake (as opposed to hill slope erosion of sediments). Because of what Dunne calls a major computer error, Mr. Durbin processed much of the LTIMP information using the wrong "triplets" (he averaged the wrong numbers together). Had Mr. Durbin instructed the computer correctly, he would have realized that in some cases his own information disproves the hypothesis. On other occasions, the computer program is too highly variable to allow for Mr. Durbin's kind of budget analysis. Like Drs. Goldman and Byron, he feels that the Durbin nutrient budget analysis ignores the contribution of organic nutrients and mineral particles which are coated with

fine layers of nutrients. He offers the opinion that even subsoil particles have attached phosphorous and iron which can enter a stream through seepage.

Overall, he feels that the IPES system is a legitimate way to examine the landscape and to anticipate the effect development may have on sediment and nutrient transport, and overall he feels that Mr. Durbin's analysis is unscientific.

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PLAINTIFF'S REBUTTAL CASE:

The first witness on rebuttal was MR. DAVID STRONGIN, who has lived in Incline Village since 1969 and was a vocal critic of certain aspects of the TRPA regulations.

Approximately four years ago he talked to Dr. Goldman, who indicated to him at the time that his studies were beginning to show that runoff from single family residences was not all that important to deteriorating water quality in Lake Tahoe. The Court considers this impeachment, not substantive, evidence.

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NOBLE MURRAY was called to rebut the valuation approaches used by defense appraiser Steven Johnson. Though not an MAI appraiser, Mr. Murray feels that Mr. Johnson inappropriately applied a discount because of the difficulty of access to the Hilltop lots in Uppaway. He also feels that it is too speculative to try to establish market conditions for the alleged eventual movement of the IPES line. Finally, he did his own comparable sales analysis, which included sales in the nearby Glenbrook subdivision and which was considered and rejected by Mr. Johnson. By including sales from such a nearby area, confidence-levels go up, he feels, and so do values.

Overall, Mr. Murray feels that the aggregate value of the Hilltop lots in Uppaway as of June of 1987 is some 2.025

million dollars, and as of January of 1982, 1.825 million dollars.

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DR. WATKINS MILLER, a UNR Professor in Soil Physics, Soil Chemistry and a teacher who lectures frequently in hydrology, testified that he was Mr. Guerrant's thesis advisor, and that Mr. Guerrant did not ignore the kinetic energy associated with rainfall. Instead, he simply used a conversion-equivalency from another expert.

As a thesis advisor, he feels that Mr. Guerrant's thesis is based on solid scientific analysis, the results of which will soon be published. Like Mr. Guerrant, Dr. Miller feels that the Cagwin type soils present in Lake Tahoe Basin possess low soil erodibility and that slope becomes a factor in such soils only in extremely unusual storm events, such as those which would occur on an average of every 200 years.

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PROF. MAHANNAH wa recalled to the stand to reinforce his position that nutrients which are channeled into the subsoil as the result of the action of the infiltration trenches in Uppaway are, for the most part, if not entirely, taken up by the overlying vegetation. Professor Mahannah testified that those waters and nutrients which percolate or settle to a depth of several feet are stored there momentarily, and the nutrients are taken up by the vegetation, which is so abundant that it could use up far *more* nutrients.

Prof. Mahannah agrees with Dr. Dunne's statement that the largest source of sediments comes from roadcuts, but he does not feel that there is any evidence of waterborn sedimentation through the gunnite stabilizing measures at Uppaway. He feels that what Dr. Dunne was observing were "tailings" from excavations by rodents in the vicinity. Professor Mahannah is undissuaded by the defense experts and feels more confident than ever that Uppaway is contributing nothing to Tahoe's pollution problems.

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Finally, Mr. Timothy Durbin was again called to the stand by the Plaintiff to defend himself against the broadside attacks leveled by the defense experts who questioned his nutrient and sediment budgets. He defended, as well, the conclusions he draws respecting the insignificant role played by development on the loss of water clarity in Lake Tahoe.

Mr. Durbin testified that he is more firm than ever in his ultimate conclusions, stating that if it is true that the data he used to develop the budgets was too meager or too variable to be relied upon, then the similarly unproven and untested data which is relied on by TRPA, should also not be used to support a land use ordinance system such as IPES.

Responding to Dr. Goldman and to Dr. Byron, Mr. Durbin does not feel that organic particulates of phosphorous and nitrogen are very important, because most of those two forms of nutrients are not "biologically available". They are, instead, "refractory", which is to say that they biodegrade or decompose so very slowly that they become "labile" or unavailable for algal uptake. Thus, they do not play a significant role in the system.

Mr. Durbin defends his retrospective mathematical extrapolations as well. He notes that available data in the early 1960's showing a dramatic surge in nutrient loading helps guide the proper extension of the backward line and reinforces the accuracy and legitimacy of his model.

He uses Dr. Byron's statistics involving streamloading of six chosen streams to support a conclusion that data from those six streams, when plugged into his nutrient budget, demonstrate the relative role of development as to nitrogen deposition to be a 7% contribution, which is not that far from his 6% figure. He admits, however, that Dr. Byron attempted no similar extrapolations from the same data.

Regarding Dr. Cahill's analysis, Mr. Durbin feels that both Dr. Cahill's 36 ton per year estimate of atmospheric

deposition, as well as his own estimate of 51 tons, may be low. Available data shows that the concentration of atmospheric deposition from all sources is higher at the mid-lake buoy than at the Ward Lake stations. The Ward Lake watershed receives a lot more precipitation than does mid-lake. Mr. Durbin can't explain the reason for this differential, but the data does seem to show higher loading than might be gleaned from looking only at the Ward Lake data.

After listening to Dr. Coat's criticisms, Mr. Durbin was prompted to perform a statistical test subjecting his claims to standard deviation testing. Those calculations allow him to say now that the nitrogen budget could be off by plus or minus 1.2 tons per year, the phosphorous budget by 0.2 tons per year and the sediment budget by plus or minus 4,000 tons per year. Even with those deviations, however, his opinions remain the same.

Testing for standard error on the contribution of development, could have been off by as much as 1.7 tons per year for nitrogen, .3 tons per year for phosphorous, and as much as 5,500 tons per year for sedimentation, but again his opinions are unchanged.

Regarding Dr. Dunne's criticisms, Mr. Durbin refers again to the Hill and Nolan studies, where the major contributing factor to sedimentation comes as the result of drainage density and erosion occurring in the channel and on the stream banks as opposed to other theories where that sediment is transported from the slopes of the watershed to the stream. Basically, he feels that his opinions are based on empirical data, while Dr. Dunne's opinions are more theoretical.

On cross-examination he admitted that if he made a major computer software programming error, his independent analysis does not corroborate the Hill and Nolan analysis. He further admitted that some of the information on this topic came to him from verbal communication with Mr. Nolan; that is, the data supporting the hypothesis cannot

be found inside the Hill and Nolan paper itself. (Exhibit SSSS-5).

Concluding, Mr. Durbin feels that TRPA should stand back and take a new look at its IPES system because he feels that he has proven, at least generally, that the TRPA has erred in erecting the foundations of its land use regulation system on a study of hillside erosion and nutrient transport. These features, he feels, play such a small role in the overall dynamics of the contamination of the waters at Lake Tahoe that an entire system of land use regulation based on their tenets, is ludicrous.

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FROM THE VIDEOTAPE DEPOSITION OF DR. MARGARET DAVIS:

While she is qualified to hold a number of titles, DR. MARGARET DAVIS might be best described as a paleoecologist. A Fulbright scholar, Dr. Davis has taken a multi-disciplinary approach to her works, which allows her to predict what the past might have looked like — and what the future might look like — by examining pollen, grains, diatoms, sediments and the like which have been deposited on lake bottoms.

Comparing that evidence with known histories of development and other environment and geological data, Dr. Davis is able to form cross-disciplinary opinions about influences at work inside particular lake environments.

She has not had too much direct experience with Lake Tahoe (which she calls a world class lake), but she has examined a number of lake environments, both coniferous and desiduous, that possess important similarities. She has examined Tahoe data and compared that information against the data produced from extensive studies done in several other, mostly Eastern and Northeastern, lakes particularly

those known as Linsley Pond and Harvey's Lake. These lakes are similar to Tahoe because there was in each instance extensive early logging activities around each body of water followed, several decades later, by extensive house construction.

Dr. Davis feels that it is important to note that logging in "patches" (as opposed to clear cutting of major timber stands) allows the lake to "recover" as revegetation commences in the areas temporarily disturbed and prevents long-term excessive nutrient loading and algae production. She contrasts this phenomenon with permanent disturbances represented by house building, where the nutrient loading is more continous and unremitting and is concomitantly more lake-threatening.

She is not at all surprised, then, that Dr. Goldman and Dr. Byron were not able to detect significant damage to Tahoe's clarity during the late nineteenth century which may be owing to logging operations. She is also not at all surprised that they have discovered significant deterioration in Tahoe since the early sixties.

She also can find evidence of "mixing" of sediment at the bottom of Lake Tahoe. While sediments may "focus" or gravitate toward the center of the lake, there is no evidence of "focused" sedimentation from the logging period.

On cross examination, she admits that her conclusions about Tahoe are bases mostly upon her training combined with her analysis of existing studies and data. She has neither conducted nor supervised studies in the Tahoe basin, which has many dissimilarities (particularly in terms of its size and depth) from the lakes which were used as comparison points such as Linsley Pond and Harvey's Lake.

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This completes the Court's digest of the testimony adduced at trial. It's time now to announce the first of several legal conclusions which are based primarily on this evidence.

IV. FIRST CONCLUSION:

Concerning the first of the three major issues which need to be decided in this case, the Court concludes as follows:

> IPES IS BASED ON SOLID SCIENTIFIC PRINCIPLES; IT IS CLEVER, RATIONAL AND EVENLY APPLIED; IT IS ALSO CONFUSING TO THE AVERAGE PERSON AND IN THE GRAND SCOPE OF THINGS, INSUFFICIENT BY ITSELF OR IN CONJUNCTION WITH CURRENT PRACTICES TO MAINTAIN TAHOE'S CLARITY. THE REGULATORY SYSTEM PREDICATED UPON IPES IS VALID, HOWEVER, AND WILL STAY VALID AS LONG AS THE DEFENDANTS CONTINUE TO SHOW GOOD FAITH ON OTHER FRONTS.

V. FIRST DISCUSSION:

On Saturday morning, February 10th, the Court walked through the entire Uppaway subdivision during unseasonably warm temperatures. The snow pack from a storm a week earlier was rapidly melting.

One of the lakefront lots bears a home nearing the completion of construction. It was graced with an expensive metal roof. Snow melt was cascading off the roof onto the adjacent driveway. Two large wheelbarrows located in the driveway were already filled with water and overflowing waters dumped onto the street, where part was captured by the Plaintiff's much-discussed infiltration system. Because one of the wheelbarrows was positioned over a small crest in the driveway, some water was also spilling down towards the Lake.

The infiltration system did not immediately capture all of the water which was running on the asphalt roadway because in some places fugitive soil had been compacted on the

drainage rock, which overlies the trenches. In these places, the water migrated in rills downslope, but it was successfully captured by the junction boxes or "manholes" which seemed to be easily handling the flow. There was no evidence of recent overflows or spillage from the lateral drainpipes connected to these boxes. In other words, Mr. Kelly's infiltration system was working well, at least on that day.

Does that mean, then, that nutrient-ladened, algae-forming, overflows will never find their way from Uppaway parcels and slopes to the Lake?

Imagine, please, the year 2090. Indulge in a speculation that private vehicular access to the Lake has been curtailed, woodburning prohibited. Over the preceding 50 years no one with the watchful eye of a William Kelly has (behind the closed gate of Uppaway) prevented the Uppaway infiltration system from becoming seriously clogged with sediment having built up incrementally, year after year. A sudden hundred year storm causes rainwater to melt a snowpack, overburdening the infiltration system and causing sediment-ladened runoff to head toward the Lake. Is the runoff significant to algae production? Probably not, if that is the only runoff reaching the Lake. Is the runoff significant when considered part of the runoff sheeting off impervious surfaces such as rooftops and roads in subdivisions surrounding the entire Lake?

Put another way, is it irrational for the Tahoe Regional Planning Agency to place controls on residential development while it learns more about how Tahoe's delicate macrosystem operates and balances itself? Plain sense tells the Court that the answer to this question has to be "no". But posing and answering such a simple question unfairly deflects the thrust of what Mr. Kelly and his people are saying.

Mr. Timothy Durbin, Professor Clare Mahannah and the other Plaintiff experts would probably admit that some nitrogen and phosphorus may someday (at least during an extraordinary event) enter the Lake from the hillslopes of

Uppaway. They also know that Tahoe's magical clarity is being lost by reason of "cultural" or man-initiated activities.

Mr. Kelly's experts are merely trying to show that Uppaway's contributions are *de minimis*, that they just don't make a difference. Through these experts, Mr. Kelly's attorney is trying to prove that Uppaway's impact on the Lake, as an engineered subdivision, is so inconsequential on a global scale that further regulation of his client's property, and by extension, further regulation of other properly engineered subdivisions, is both unfair *and* irrational.

Because there is a lesson in their testimony (albeit a different one than the one they are teaching), neither this Court, nor anyone interested in Lake Tahoe's future should turn a totally deaf ear to the opinions of these experts. Mr. Kelly's case requires a careful examination.

The heat of Mr. Kelly's case comes from the research and the mathematical models and budgets created by former USGS scientist and administrator, Timothy Durbin. Mr. Durbin thinks he has developed a scientifically sound hypothesis which will debunk the foundations of IPES.

Part of Mr. Durbn's hypothesis is not impossibly complex. That is to say, it can be comprehended by most lay persons. He takes a known law in physics that applies to any substance, whether the substance is nitrogen, phosphorus, or even sediment loads. The law, which is called the "Law of Conservation of Mass", may be stated as follows: The difference between input and output equals the change in storage or inventory.

When he sought to apply this physical law to Tahoe, Mr. Durbin then used some in-flow data from several sources and stations which were monitored cooperatively in the 1980's by the Lake Tahoe Inter-Agency Monitoring Program (LTIMP). That inflow data was compared against other available data on out-flows at the mouth of the Truckee River.

A fairly simply mathematical calculation allowed him to determine the storage change. As examples of the magnitude of storage change, he offers the opinion that the storage change for sediment is some 24,000 metric tons a year, and for nitrogen, it is some 40 tons per year. A sample budget (for nitrogen) looks like this:

NITROGEN BUDGET
(METRIC TONS PER YEAR)

INFLOWS	PRESENT	STEADY-STATE
Streams	9.8	5.9
Atmosphere	56.1	8.5
TOTAL	65.9	14.4
OUTFLOWS		
Truckee River	5.3	3.0
Sedimentation	20.6	11.4
TOTAL	25.9	14.4
STORAGE CHANGE	40.0	0.0

His budgets rely upon a mathematical extrapolation to reach what he calls a new "steady state", a condition he feels to be a proper logical conclusion drawn from the model.

Using some aerial maps and some road maps, Mr. Durbin calculated an area which he assigned to all development in the Tahoe Basin (38 square miles, or approximately 13% of the whole basin area). He factored that gross acreage figures against all possible

stream flow sources of nitrogen, phosphorus and sedimentation, assuming a so-called "worst case" in which "all" offending material which could be attributable to the developed areas found its way to the stream source. His analysis then became a little more complicated, as he employed certain statistical regression formulae to develop baseline statistics for earlier years, such as 1960 and before; finally, he created some algebraic equations which allowed him to allocate the offending nutrients between developed area sources and all other contributing sources.

By so doing, Mr. Durbin compares the stream load with the atmospheric load both now and pre-1960 (present vs. "steady-state"), and using a formula of his own design:

$$\left[\frac{\text{nitrogen}}{\text{area of watershed}} = \text{coefficient } a + b\left(\frac{\text{streamflow}}{(\text{area of watershed})}\right) + c\left(\frac{\text{developed Area}}{\text{Area of Watershed}}\right)\right]$$

he solves for the relative contribution of development.

His conclusions about Tahoe's growing problem with algae are that out-of-basin sources of nutrients and atmospheric depositions of nutrients on the Lake's surface, taken together, literally dwarf the role which is played by streamborne nutrients which may be caused by residential or commercial development.

Putting numbers to these conclusions, Mr. Durbin feels that only 6 percent of dissolved nutrients can be blamed on development, (with the term "development" including both commercial and residential development). As to sediment loading, which he claims does not transport much nutrients, only 3,000 of the 24,000 tons per year of sediment are attributable to development under his theories and calculations.

The Court finds two general problems with Mr. Durbin's approach. First, the Court is not prepared to say that the magnitude of nitrogen and phosphorus at some 6% is a legally insignificant amount. Similarly, 3,000 tons of sediment is not in legal terms something which is necessarily "de minimis". This topic will be addressed at much greater length in a moment.

The Court has as second major problem: it is not persuaded that Mr. Durbin's underlying hypothesis merits great confidence. If anything, it is too bold, too sweeping, and just too pat.

The Court was reminded of a point-counterpoint situation set forth in a recent book by the iconoclastic author who first became popular in the 1960's, Ken Kesey.[1]

In an effort to justify the foundations of his personal, existential philosophy, an aging professor and mentor of Kesey's alludes to the abortive attempts of a Nineteenth Century physicist to disprove the Second Law of Thermodynamics, a principle which is not at all dissimilar to the Law of Conservation of Mass utilized by Mr. Durbin because it relies on the measurement of inflows and outflows (in this case not of nitrogen and phosphorus, but of energy):

> " . . . all . . . moving things of our world, all the marvelous, spinning, humming, ticking, breathing things should be doomed to run down and die . . . . We may be drifting for the rocks, but there is nothing we can do but stand at the wheel, helpless, and wait for the boat to go . . . down." Page 330 and p. 332.

After ten years of struggling with the notion of the utter futility of positive effort to bring new and resuscitating energy to human endeavors, Kesey's

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[1] Kesey, Ken, *Demon Box*, Viking Press, 1986.

autobiographical character, a fellow named Deboree, finally meets up with a young lady whose intellect challenges, and perhaps, surpasses the old professor's. Her rejoinder:

> " 'Entropy', she whispered behind her hand, like a resistance fighter passing a vital secret under the very nose of the enemy, 'is only a problem in a *closed system.*' " (Emphasis supplied) *Id.* at page 372.

This Court will agree that the laws of physics, such as the Law of Conservation of Mass and the Second Law of Thermodynamics, contain immutable principles.

Nonetheless, Mr. Durbin's calculations as to in-flows and outflows of nitrogen and phosphorus can only be measured with any exactitude in a *closed system.*

The evidence at trial shows that the Lake Tahoe Basin is not yet even in a position of being measured to the degree that it has the chance to be called a *closed system.* There are not just the 7 tributaries (which were measured by the LTIMP agencies) feeding Lake Tahoe, but there are some 107 tributaries or watersheds. According to all of the witnesses who testified on the subject, they dramatically vary in terms of their nutrient loading features. Even if comprehensive measurements are eventually achieved, the Tahoe basin is still too changeable, too dynamic, to be looked at as a *closed system.*

Dissolved nitrogen does not occur in the same concentrations near the surface of the Lake, as it is much more heavily concentrated as the bottom approaches. This has great significance when looking at measurements of nitrates and phosphorus at the shallow mouth of the Truckee River, as Mr. Durbin did. Woodburning stoves combined with temperature inversions trap particles close to the Lake during many weeks of the winter. Streams are subject to enormous fluctuations and variabilities in terms of the nutrient loading.

Several hundred forms of algae and bacteria act in the system and their proliferation pinch and swell.

At this point in the science of the examination of the decline in the purity of the waters of Lake Tahoe, Mr. Durbin's Law of Conservation of Mass and the budgets which he builds around that law are frightfully oversimple. There are no calculations or accounts for the transfers between organic and inorganic pools; there are no exacting calculations or accountings for the contribution of particulates of nitrogen and phosphorus as distinct from those same elements in their dissolved form; there is no scientific proof for his theory that near-surface bottom sediments have been "mixed"; there are no wind and atmospheric studies to show the precise mechanics of airborne depositions of nitrogen; there are no stream by stream comparisons of nitrogen uptake from nearby vegetation. None of the baseline studies which Mr. Durbin relies upon have redundancy safeguards, nor have they been tested over long periods of time. The precise "velocity" of depositions of nutrients is virtually unknown at present; there are as yet no systematic studies which compare the experience between the so-called, "dry" years and the "wet" years.

The authors of the unpublished but highly debated professional paper entitled "Suspended-Sediment Factors Lake Tahoe Basin California and Nevada", which is Exhibit 5 to Exhibit SSSS concede at page 9:

> "Longer and more continuous periods of record from a diverse set of tributary basins are needed to formulate predictive equations."

Mr. Durbin also admits that his numbers are not exact and that they may be subject to variation. He further admits that longer studies are needed in order to give additional verity to his hypothesis.

It may well be true that different numbers and longer studies will not change Mr. Durbin's overall conclusion, that atmospheric contributions are much more important

than streamflow contributions to nutrient loading in Lake Tahoe, but that, in a sense, begs the legal question. Different numbers and values may indeed change his conclusion that steam loading is insignificant — to a conclusion that it has *some* significance. That comparatively small differential is the very difference between arbitrariness and the lack of arbitrariness when the regulatory system and its postulates are taken under judicial review.

Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987 (1962) demonstrates just how far the Courts will go to protect a legislative body's police power. In *Goldblatt*, the municipality sought to preclude further pit excavation by a gravel contractor by enforcing an ordinance prohibiting digging near the ground water level. In sustaining the reasonableness of the towns actions the Court stated:

> "Although one could imagine that preventing further deepening of a pond already 25 feet deep would have a de minimis effect on public safety, we cannot say that such a conclusion is compelled by facts of which we can take notice . . ." *Id.* at p. 595.

Many of the leading cases discussing standards of judicial review talk in terms of this "reasonableness" — but not "reasonableness" from the perspective of the Court; instead, they examine the issue from the perspective of the legislature or governing body. This shift in perspective was announced in the 1926 decision relied upon by the TRPA; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114; which also coined the phase "fairly debatable" as the test courts should apply when they examine the rationale used by the rule-making body.

This Court does not have to adopt this shallow standard to decide IPES' validity, however, because the scientific underpinnings of IPES are not just "fairly

debatable"; they are persuasive. IPES may not go far enough in protecting Tahoe's clarity from other algae-forming influences, but as far as it does go, it is based on reasonable scientific study, in fact, on the very best science which is now available.

According to the experts called by the defense to rebut Mr. Durbin's theories, it is difficult to clearly describe the fragility of the Tahoe ecosystem. Before turning to a discussion of some of the substance of their testimony, however, a couple of them described a "tipping-of-the-scales" phenomenon which accentuates their opinions. According to Dr. Goldman, for example, "added" nutrient loading, or small accretions of nitrogen, phosphorus and trace elements to the Lake, has, in some cases, disproportionate and profound environmental effects.

The concept might be likened to an aspect of getting ready for a trip into the mountains. There is, along the line, one additional can of pork and beans which the pack mule just won't tolerate. A little more becomes way too much.

Dr. Goldman first takes issue with Mr. Durbin on the subject of nutrient budgets; he does not feel that scientists have yet reached the point at Lake Tahoe where they are able to create and interpret a nutrient budget, primarily because of the complexity of the system. For example, a nutrient budget, like the one developed by Timothy Durbin which (for nitrogen) rests primarily on measurements of dissolved inorganic nitrogen, ignores the significant contribution of organic nitrogen components which may in fact be more important than inorganic nitrogen by as much as a factor of ten. He states that the conversion of organic nitrogen into inorganic forms, and vice versa, is an immensely complex cycle involving numerous relationships between the atmosphere, vegetation, streams, wind, seasons, precipitation,

phytoplankton, bacteria, water temperatures, inner-annual mixing and photosynthesis. (*See* Exhibit U.)

Not only is the nutrient cycle itself enormously complex, but it is a dynamic process as well. For example, when Dr. Goldman first began to study the Lake, nitrogen dominated the process of algal production; the role played by phosphorus and trace elements did not then appear as comparatively significant. More recently, studies under his direction show not only that there is a heretofore unstudied large pool of organic phosphorus, but also that all forms of phosphorus have emerged to play a much more important role in the accelerated eutrophication of the Lake. What is more, phosphorus has a synergistic effect with nitrogen in changing the clarity of Tahoe's waters. Further, trace elements, such as iron, zinc and molybdenum, are playing increasingly important roles in the system.

Even though nitrogen is utilized by algae on an order ten times as great as phosphorus, phosphorus is now emerging as the "limiting" nutrient, becoming more important to the relative proliferation of these organisms.

These latter phenomena are important, he feels, because phosphorus and trace elements are linked to and/or transported by sedimentary erosion in ways more pronounced than by nitrogen transport through erosion.

Dr. Byron joins his colleague in taking issue with a number of Mr. Durbin's theories. While he may not dispute the notion that the Lake is capable of a "steady state" or a nutritional balance in the food cycles of flora and fauna in the Lake and basin, he rejects the notion that a predictable evolution is taking place, particularly with respect to nutrient storage and organic nutrients associated with sedimentation.

Mass balances may exist, but they are only momentary "snapshots" of a particular condition that is seasonably subject to great variation. Since IPES

measures prospective contributions of both organic and inorganic forms of nutrients, Dr. Byron states confidently that IPES is compatible with most scientists' understanding of the biological process taking place in the Lake's environment.

Even if the Court were to find Mr. Durbin's nutrient budget plausible from a theoretical standpoint, the budget itself does nothing to support his conclusion that winds are bringing pollutants to Lake Tahoe from the urbanized coast. He seems to be asking the Court to adopt a syllogistic leap — that if the streams LTIMP measured aren't bringing a significant percentage of nutrients from the hillslopes, and since no other source is apparent, then the "inescapable" conclusion is that the pollutants are airborne, brought in by the prevailing winds.

The conclusion does escape Dr. Thomas Cahill, who knows more about those matters than anyone appearing at trial, and Dr. Cahill's answer is, again, that it is not a scientifically valid method of inquiry to use a budget to dissect an environment by isolating and examining just one part of an ever-changing system. Along with hydrogen and oxygen, nitrogen and phosphorus are among the ubiquitous building blocks for all life forms living in the ecosystem. They cycle into and out of the atmosphere, into and out of plants and animals, into and out of the water itself. They are transported by a number of conveyances including winds, snow, rain, runoff, sediments, algae, fish, bacteria, streams, roadways, roofs and drainpipes. They can come from hillslopes like those in Uppaway, and they can come from automobile exhausts. They are stored, and they are released.

Man has moved into the Tahoe ecosystem and has drastically altered it. Particularly since 1950, development has changed the topography and the functioning of more than a hundred watersheds that play key roles in the nutrient cycle. Under these circumstances the law

permits reasonable regulation, even regulation that may substantially interfere with the free use of residential property.

It may not be possible to fully reconcile all of the language contained in several key opinions from the U.S. Supreme Court. On some issues, the guidance from the High Court is clear, unequivocal and uniform. For example, all of the pertinent cases require the governing body to prove that it is promoting a legitimate state interest.

That may be the simplest task facing the Court in this case. No one has suggested that the purpose of the Tahoe Regional Planning Compact (or the purpose behind the land use ordinances promulgated to implement the Compact, is anything but legitimate.

Subsections (3)(7) and (10) of Article I(a) of the Amended Compact (P.L. 96-551, 94 Stat 3233) read as follows:

> (3) The region exhibits unique environmental and ecological values which are irreplaceable . . . .
>
> (7) There is a public interest in protecting, preserving and enhancing these values for the residents of the region and for visitors to the region . . . .
>
> (10) In order to preserve the scenic beauty and outdoor recreational opportunities of the region, there is a need to insure an equilibrium between the region's natural endowment and its manmade environment."

Clearly, the Compact seeks to advance and protect a legitimate state interest. The dispute between the Plaintiff and the TRPA does not ripen until the foundations

for the implementing ordinances (IPES) are brought into focus.

The landmark cases which predate *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.*, 482 U.S. 304, 107 S.Ct. 2378 (1987), can be grouped in such a way that they can be cited for two distinct and competing standards for judicial review.

The first is the "rational relation" or "reasonableness" test previously discussed, where the regulations are upheld if the regulators could "fairly debate" the rationale behind their rule-making, *Goldblatt v. Hempstead, supra*, 369 U.S. 590. Arguably, most zoning matters, particularly those which create land use categories, fall under this heading, where the trial Court gives enormous deference to the legislatures and regulators. (*See*, e.g. the "manifest abuse of discretion" test which Nevada has adopted in *City of Henderson v. Henderson Auto Wrecking*, 77 Nev. 118, 359 P.2d 743, 745 (1961); and *McKenzie v. Shelly*, 77 Nev. 237, 362 P.2d 268 (1961)).

Starting about ten or twelve years ago, however, a trend gradually began to develop in certain kinds of property cases which is not at all dissimilar to the history of the emergence of special protections for fundamental civil rights in substantive due process cases.

It can now be argued that the legislative entity has a greater burden — to prove not just a "reasonable" nexus, but a *substantial* one — when its zoning and land use rules tell a landowner not just what kind of use is permitted, but also *when* construction can commence and *if* some major parts of the parcel can be placed to any use at all.

What is more, some regulators are now vulnerable to inverse condemnation or "takings" claims, which is the subject of the next Discussion Section. For now, the Court will briefly outline this emerging law of

"substantial relationships" without much mention of the "takings" dimension.

There is no question that the government can promulgate land use regulations that impair or defeat recognized real property interests, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 at 124, 98 S.Ct. 2646 (1978) [where the police power was exercised to preserve Grand Central Terminal as a historical landmark].

Two years later, in *Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138 (1980), the High Court reviewed the police power exercised by a Bay Area municipality to preserve "open spaces" in a region of the northern San Francisco Bay. According to the Complaint, the ridgelands on a peninsula bordering the Bay contained some of the highest value parcels in the region, and the city had "completely destroyed" these values with its greenbelting ordinance (447 U.S. at 258). Nonetheless, the Court upheld the ordinance because it *substantially advanced* legitimate governmental goals to limit conversion of open space to urban use. (*Agins* also set the stage for *First English*, which is a "takings" case examined at length in the next section). Whether its actions were advertent or inadvertent, the *Agins* Court may have marked the beginning of the liberalization of the standard for judicial review in some real property regulation cases.

Agins was followed by *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987) where there is the strong suggestion that land use regulations are now subject to a new scrutiny when their implementation dramatically impairs the marketability of real property. Now, even if a regulation is reasonable, it must also have substantial public goals behind it and substantial causal connections with its ultimate objective in front of it. If it does not meet these tests, the ordinance may be invalid (or confiscatory, or both).

It seems now that trial courts must do more than examine a government's action for simple "reasonableness". The Court must:

> (1) compare the extent of the land-use restriction with the importance of the governmental objective; and
>
> (2) if the restriction is itself substantial, enter a finding that the ordinance as written will or will not likely achieve its stated objective.

It is true that neither *Agins* nor *Nollan* are factually similar to the case at hand. As noted, the zoning ordinance in *Agins* affected property which had not yet been subdivided into building parcels, as is the case with Uppaway's planned units. And in *Nollan*, the governmental purpose urged for public benefit involved an access-easement to a beach which had not previously existed. [The Court held that the public purpose must logically relate to the government's assertion of jurisdiction and remarked that building codes don't have much to do with easements]. So its hard to say whether the "substantial nexus" or "substantial public interest" test applies to all judicial review cases. Nonetheless, the administrative interference by the TRPA in Mr. Kelly's case is considered so substantial that the Court elects to apply the harsher test to the TRPA's endeavors.

In our case, IPES' restriction on "high-hazard" lands like the Plaintiff's, temporarily at least, is a complete one. Mr. Kelly can perhaps build out one or two of his lots in the next few years, but he has no assurance that during his lifetime he will ever be allowed to build out the remainder. One the other hand, the importance of the Compact's objective is also self-evident. Unless something is done to protect Tahoe's decline, her unique beauty will be forever lost. The case presents a classic clash between important interests on both sides.

On the second and controlling prong of the test, the Court concludes from all the evidence that IPES *is* rationally designed in such a way that it will substantially protect the Lake from contamination caused by activities on residential and commercial parcels. IPES is not a panacea, and IPES will not do the job by itself, but as far as it goes, IPES is built on solid scientific foundations.

* * * * *

While the Court has come down on the side of the TRPA by holding that there is a rational basis for IPES, (primarily because of the relatively greater precision and scholarship shown by defense experts), part of the big picture has not been illuminated by TRPA's studies. No matter what values one may assign to Mr. Durbin's theoretical nutrient budget, he *accurately* concludes that the LTIMP data shows an unexplained presence of sizeable quantities of nitrogen and phosphorus which *cannot be attributed to residential growth*, or to development generally, under anyone's theory.

Dr. Goldman admits that when he and Dr. Byron performed Lake bottom core sample tests, they were looking for evidence that logging and its consequent erosion caused a spike in algae growth in Tahoe during the late Nineteenth Century. If only for the reason that the Lake was able in a sense to almost immediately resuscitate itself, as Dr. Davis suggests, logging did not significantly increase the growth of these organisms. Modern-day chronic conditions other than just the building of homes, however, may bring Tahoe to a point where it is beyond saving.

If Dr. Cahill is correct that air masses arrive at Lake Tahoe from the relatively clean airsheds of the Pacific Northwest and that a lot of the airborne pollution which is carried to the Lake by winds has already settled or been "scrubbed" out, then the proportionate contribution of in-basin (but other-than residential) sources is a

puzzle awaiting a better solution, a solution which should be given a priority effort by the planning agency.

It is more from policy than from science that the TRPA chooses to call Tahoe's Cagwin soil types highly erosive. The better evidence shows that these soil groups are only moderately erosive under most circumstances. What the evidence does tend to show is that Cagwin soil becomes highly erosive when it becomes compacted. What the evidence also tends to show is that the soil group is highly conducive to a "rilling" phenomenon and that runoff produces serpentine channels through the soil as water runs from the impervious surfaces through drain pipes and gutters and into the soil. The evidence also tends to show that the problems of erosion, sedimentation and runoff are dangerously exacerbated during major storm events such as when warm spring rain falls on a major snow pack.

It may be time for the TRPA to rethink some of its standards such as the so-called "20 year event" drainage control management practice. In fact, it may be time for the TRPA to rethink and restudy a number of its current parameters. The evidence suggests a deficiency in the breadth of the management practices at Tahoe. Despite the work done to date by major scholars, there is an absence of a comprehensive coordinated scientific study upon which to comfortably rest coordinated planning measures.

There are some sources which may have as dramatic an effect on the water quality of the Lake as the combined effects of residential development. Consider, for example, the following inquiries:

(1) Exactly what percentage of the deleterious nutrient load may be coming from fertilized lawns, especially from golf courses in the South Shore, Edgewood, Glenbrook and Incline Village? There is probably enough evidence available now to regulate laws

management practices as there is evidence to regulate homebuilding.

(2) Consider also the Little Truckee River. If at one time some 40% of Tahoe's inflowing water wound and filtered through the wetlands and meadows which were partially covered by Tahoe Keys, how extraordinary an event was that to the fragile tolerance levels of Lake Tahoe? It has already been established in this case that the TRPA is not what one would normally consider a condemnatory authority, primarily because it simply doesn't have the money to condemn and purchase land such as Tahoe Keys. Is the wetland loss significant enough to go to a governing authority who would have funds to restore these nutrient-scrubbing wetlands? The experts don't yet have an answer to that question.

(3) If woodburning stoves and temperature inversions blanket Lake Tahoe with clouds of particle-laden smoke, then why isn't woodburning prohibited during certain climatic conditions? Isn't that nutrient and sediment source deemed significant enough for such regulation?

Experts don't have that answer yet, either, but the early evidence provides a sufficient basis for more stringent regulation than now occurs.

(4) If in-basin auto emissions might have a tendency to tip the balance, why isn't the TRPA taking a stand before the state legislatures regarding mandatory public transportation systems for visitors to the Basin and stringent automobile emission standards for its part-time and full-time residents, or is the relative contribution of automobile emissions too insignificant to consider these drastic measures? The experts haven't fully studied that problem yet either.

(5) Dr. Thomas Dunne offered convincing testimony that sheetwater on asphalt is capable of transporting pebbles ranging from fine particles up to the size of a tennis ball. Following snow and ice removal efforts by California and Nevada's transportation departments, that

kind of action must be occurring on public highways throughout the winter months, made worse by trucks, placing down sand and salts and made worse yet by vehicle traffic crunching the residues.

How many nutrients adhere to these particles? How many public thoroughfares are insufficiently curbed and guttered? How many more infiltration trenches are needed to mitigate road surface contributions?

From the perspective of the aerial photographs introduced at trial, the roadways of the Tahoe basin look like dark watercourses, and they must actually act something like watercourses, too, during rainfalls and runoff periods, because more "impervious coverage" is associated with roadways than with all rooftops and driveways in the basin combined. Logically then, at least as much attention needs to be paid to what is happening on these roads, as is now being paid to what is happening on private property.

This Court has determined that the IPES system, which slows residential growth and which requires best management practices, is a legal system because it makes plain sense and because it is evenly applied and not discriminatory. This finding is not an absolute one for all time, however. It is not very likely that the IPES line will move too much in a direction permitting much further residential construction until the contamination of the Lake has abated. Without a coordinated effort addressing far more than just residential development, there seems to be little hope that major improvements in water quality are going to come from regulating residential and commercial construction, when other nutrient sources are not being addressed and regulated with equal persistence.

It makes further sense, then, that if landowners are eventually found to be bearing a disproportionate part of the burden of regulation and if it turns out that lake algae continues to flourish and multiply, there may yet be a

point when IPES becomes legally unfair to the landowner and legally vulnerable to new challenges from people like William Cody Kelly.

* * * * *

It will be obvious to the attorneys that for several pages now the Court has been making observations that are mostly *dicta*; they play no role in the issues before the Court for present adjudication.

There is a final problem with IPES that falls into the very same category, that is, a gratuitous comment that plays no role in the decision. The comment is that IPES is unnecessarily confusing to an average person.

That a system may be rational does not necessarily mean that it is clear and easily understood by the Tahoe landowner.

For example, part of the IPES scoring process measures slope length and grade using the following formula:

$$LS = \frac{\sum_{j=1}^{n} (Sj)\left(j^{1.5} - (j-1)^{1.5}\right)}{1{,}022.47}$$

And the formula for measuring erosion hazard reads:

$$REH = \frac{899.72 - \sqrt{809{,}496.1 - 4(x^2 - 1065.45x + 202{,}612}}{2}$$

*(Formulas taken from Exhibit i-3, pp. 2 and 3 of the Technical Appendices to the Plan.)

Perhaps it is unfair to pick out and highlight these highly technical details. Perhaps also there is no more sensible way to approach the explanation than the approach the TRPA employs. Nevertheless, even experts who read IPES in its entirety have trouble interpreting it.

There may be something of a moral obligation for public servants to use their best efforts to demythologize their jargon, to publish simple statements like the following testimony from Mr. Ziegler (paraphrased):

> "There are 478 viable building parcels in Douglas County. Under current trends, it will be several years before lots with fairly low scores will be considered for permit approvals."

Perhaps as this litigation finally winds up, TRPA representatives will find a better atmosphere in which to utter plain statements like Mr. Ziegler's, statements about the use of private property which owners can rely on and plan for the future.

To conclude this Section, the Court finds:

1. That phosphorous and nitrogen and some important trace elements in Lake Tahoe are in fact increasing beyond their historical levels;

2. That increased levels of nutrients are in fact causing increased algal growth;

3. That increased algal growth and sedimentation do in fact cause loss of water clarity;

4. That sediment and nutrient transport from so-called "hazardous" residential areas are in fact having a meaningful and pronounced effect on the contribution of phosphorous and nitrogen and trace elements to the Lake.

On these grounds, the Court concludes:

1. That the IPES system examines runoff and erosion hazard characteristics of individual lots and anticipates the effect which development may have on sediment and nutrient transport; and

2. Even though the IPES point system, for the most part, discounts the mitigating effect which best management practices may have upon nutrient and sediment transport, it is, nonetheless, rationally based because it evenly and scientifically rates runoff potential and erosion hazard which might ultimately flow from the parcels it measures.

* * * * *

VI. SECOND DISCUSSION; THE TAKINGS' ISSUES:

The second major task facing the Court is to decide whether the TRPA has temporarily or permanently deprived Mr. Kelly of the beneficial interest of his property in such a way that it must compensate him for the taking under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Before proceeding further into this discussion, the Court wishes to make a threshold observation to prevent confusion over semantics. In the previous Section, the IPES ordinances were determined to be "valid" because they rest on a rational premise and are reasonably designed to achieve the goals of the Compact. In other words, the Court has already decided that an unconstitutional taking has not occurred because the ordinances are not Constitutionally suspect in a substantive due process sense. The decision in *First English Lutheran Church v. Los Angeles County, supra*, raises the specter of a different "takings" issue altogether. An ordinance may be "valid" and still confiscatory. (In fact, it is hard to imagine a public purpose more "valid" or salutary than the effort by Los Angeles in the *First English* case to

mitigate the chance of handicapped children drowning in a flood, but the Court will defer for a few moments any further discussion of the special facts of *First English*).

The issue now under scrutiny in our case is not whether the TRPA's ordinances are a valid exercise of the police power belonging to the State Defendants, but whether the implementation of a valid ordinance works a condemnation of private property, and in this sense gives the Plaintiff a remedy recognized by the U.S. Constitution.

It might be best to begin the "takings" discussion with three issues which the Court has considered but has promptly rejected as having little application in this case. They are a so-called "facial" challenge, the claim that a permanent taking has occurred, and Mr. Kelly's claim of a temporary taking from 1982 until the new ordinances went into effect.

Agins, supra, is a pretty good example of a what a "facial" challenge is all about. In *Agins*, the appellants purchased five acres on a hill in Tiburon, CA. Because of the fabulous views from the property, they considered their acquisition to be a wise investment, at least until the city adopted two ordinances that zoned the property for use for single family dwellings only. They never sought approval for development of their land; they simply brought suit claiming that the ordinances were on their face unconstitutional. Ruling that the ordinances did not forcibly deprive the Agins of the best use to which their land could be put, the Supreme Court affirmed the California Supreme Court ruling upholding the ordinances.

Mr. Kelly has also mounted a half-hearted facial challenge. Like the Agins, however, Mr. Kelly must go behind the TRPA ordinances because they do not on their face deprive him of all use of his property; in fact, he has already placed part of his property to extensive use. (Note: deferred for later discussion is the

investment-backed expectation aspect of *Agins* and other cases).

The second relatively minor issue, at least from the Court's standpoint, is the claim that the Uppaway hilltop has been permanently taken. The argument is based on the fact that neither Mr. Ziegler nor anyone else can tell Mr. Kelly when he will be able to apply for building permits for the lots numbered 37, 34 (formerly #47), 33 (formerly #50); or 38 (formerly #51) which have all, despite an administrative appeal, failed to reach the 725 point "cut off" threshold value for building permit applications (*see* Exhibit 7-23c and YYY).

The burden is on Mr. Kelly to prove by a preponderance of the evidence that both a taking has occurred and that it is permanent. Without yet deciding the former issue, the Court finds that Mr. Kelly has failed to prove permanence. Mr. Ziegler and others testified that in the next several years the 725-point cut-off line is likely to move downward. The line needs to be lowered by only 33 or less points to make all four remaining lots eligible.

The third issue which the Court deflects away from primary consideration is the claim of a "taking" starting in 1982. Part of this claim has already been disposed of in the Order Partially Granting Summary Judgment. Between 1984 and 1987, the TRPA was under a federal court order to stop processing applications, and the Court has ruled this period to be non-actionable. In 1982 "case-by-case" reviews were the governing procedures, and in 1983, the TRPA placed itself under a moratorium.

Had the Plaintiff's subdivision been singled out for regulation, then his pre-1987 "takings" argument would carry a lot greater force. During this early period, however, the TRPA was trying to cope not with six lots, but with something on the order of 14,000 lots according to Dr. Twiss and Mr. Morgan. The TRPA's conduct

during this period might be described as more "deliberative" than "appropriative". Mr. Kelly's frustrations, particularly in the summer of 1983, are both reasonable and understandable (and will be further addressed in the Third Section), but they are ruled, once again, to be non-actionable, at least in a "takings" context.

Moratoria are exempt from claims of deprivation of property under the Fifth and Fourteenth Amendments as long as three ingredients are present. First, there must be some evidence of proper planning and good faith on the part of the government, *see*, e.g., *O.C. Const. Co., Inc. v. Gallo*, 649 F.Supp. 1331 (D.R.I. 1986); affirmed by *O.C. Construction Co., Inc. v. Gallo*, 836 F.2d 1340 (1st Cir., 1987) (where the court found a town council's efforts wanting in this respect). Second, there has to be a significant public purpose served by the moratorium, *see* e.g., *Schafer v. City of New Orleans*, 743 F.2d 1086 (1984) (where an ordinance prohibiting permits for neighborhood fast food restaurants during the pendency of a 10 1/2 month study was upheld). Finally, the moratorium must be reasonable in its duration, considering the complexity of the problem, *see* e.g., *Smoke Rise Inc. v. Washington Suburban Sanitory Commission*, 400 F.Supp. 1369 (1975) (where a five year ban in sewer hookups in a complex multi-jurisdictional drainage basin was deemed reasonable).

The self-imposed moratorium of the TRPA in 1983 meets all three of these criteria. The TRPA was acting in good faith, particularly when it is considered that they were under the threat of litigation by the State of California. The public purpose was, as earlier discovered, significant. The duration of the moratorium was reasonable in light of the complexity of the problems facing the TRPA.

* * * * *

With all preliminary matters out of the way, the Court can now focus on what it feels to be some truly intricate

and difficult Constitutional claims. In so many words, the U.S. Supreme Court has admitted to being unable to formulate set guidelines of general application which lower courts can use in a more or less mechanical fashion to determine when a regulatory "taking" of private property has occurred, because there are so many "ad hoc" factual inquiries unique to each case that need to be addressed, *see* e.g. *Keystone Bituminous Coal Ass'n. v. De Benedictus*, 480 U.S. 470, at 495, 107 S.Ct. 1232 (1986).

The Supreme Court's perplexion may be understandable. Although relatively few cases have come down since *Agins, supra*, the complexion of cases which have been reviewed by the Supreme Court differ dramatically from one another. Further, the pre-*Agins* line of "takings" cases is equally disharmonious, again because of factual dissimilarities.

One author has gone so far as to liken the elusive inquiry to a "hunt for the quark", C. Haas, Land-Use Planning 766 (3d ed. 1976), quoted in S. Loger-Friedman, "Constitutional Rights as Property?: The Supreme Court's Solution to the 'Takings Issue' ", 15 Columbia Journal of Environmental Law 31.

Despite the absence of a coherent pattern in the tapestry of "takings" cases, upon closer analysis some coherent, if subtle, principles do begin to emerge. For example, there is a group of cases which might be referred to as "*per se*" compensability cases, to borrow a term from a New York case briefed by both sides, *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989). The common thread woven into the fabric of these cases is that some kind of *physical occupation* or *trespass* has occurred.

Nollan, supra, and the case quoted many times by the Plaintiff, *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383 (1979) contain examples of this thread. In *Nollan*, (as noted in the last section), the public was

given a permanent right to travel, without cost, back and forth across the plaintiff's beachfront property. In *Kaiser Aetna*, the public was granted the right to enjoy a private Hawaiian lagoon in exchange for a ruling which allowed the developer to dredge the lagoon and improve the navigability of its shallow waters. In both cases, the duty to the public imposed on the landowner as a condition to the issuance of permits had little if anything to do with the benefits awarded to the public by the rulings. Building codes and navigation rules are designed to promote the safe use of property; they don't say anything about *who* (outside the landowners and his guests) should benefit from the safety achieved by implementing the regulations. Put another way, if the public is invited to use private property, its government must pay for the use.

Naturally, the TRPA seizes on this point and invites the Court to decide from the evidence that there is nothing at all about IPES which is physically invasive. Mr. Kelly can keep his front gate locked, as far as the TRPA is concerned, and keep the public away from his property at his fancy. Unfortunately, the issue may not be as simple as determining whether or not IPES invites members of the public to come on or over private property for their own purposes.

Nollan, Kaiser Aetna and *Seawall* are all cases where the regulation is *inherently* invasive. The public's flag, so to speak, has been planted squarely on the property itself. However, there may be other forms of compensable regulatory "takings" which are not so obvious and not so physically invasive. The issue may involve more than dominion over lands; it reaches more subtle form of public *appropriation.*

The Plaintiff is asking the Court to examine these subtleties, to take a careful look at the genuiness of the TRPA's announced motives. If the TRPA is trying to disguise a hidden purpose — for example, to offer the

public unimpeded views of the Lake from the eastern shore (or for that matter views of the ridge from the Lake which are not interrupted by houses jutting out from the landscape) — then the TRPA is *appropriating* the Plaintiff's land in ways which *Nollan* and *Kaiser-Aetna* prohibit, even though members of the public may never set foot in Uppaway.

The TRPA has admitted in so many words to having a couple of agendas that can't be found in any official TRPA publications. When Dr. Robert Twiss reviewed the history of the development of IPES, he pointed proudly to the fact that no new subdivision lots have been approved in the basin since 1982 (*see* Exhibit Z-58), though he later offered the opinion that IPES is not a growth control measure.

Former TRPA director William Morgan is perhaps more forthright or insightful when he admits that IPES not only affects residential growth and land capabilities, but it also indirectly controls other facets of travel and development in the basin. Current Agency director David Ziegler states that IPES gives planners and the Forest Service the time to attempt to "retire" by orderly purchase a number of very high hazard lands before further building is allowed on moderately erosive parcels.

Obviously, the issues of carrying capacities have been very much on the minds of the staff and management of the TRPA since the outset. It is equally obvious that carrying capacities and staged growth were on the minds of the participants in the Consensus Building Workshops.

Perhaps no clearer example of this proposition exists than in the transmutation and incorporation of the Bailey Land use coverage formulas into the IPES measurements. When Mr. Foster looked to the technical details of changing the Bailey system, he admits that the first "curve" for allowable land coverage under the tentative

new Relative Erosion Hazard formulas embraced too many parcels, that too much building might commence too quickly unless greater differentiation were achieved. That's what gave rise to the complicated mathematical formula quoted earlier on page 88. For his part, Mr. Ziegler admits that the allowable land coverage formulas were mathematically "tweaked" (not his word) to give the percentage land use coverage a more even curve between the five and twenty five percent categories. Clearly, these were growth control *policies* being infused into IPES by administrative, not scientific decisions, just as growth control policies were infused into ordinances 81-1 and 81-5. Just as clearly, the TRPA does not want to see the Tahoe Basin subject to a rapid build-out and the Agency is intentionally controlling absorption rates with its IPES cut-off line.

Nonetheless, whatever the personal views of its authors and architects, whatever policies have helped guide its creation, IPES is there to be examined by objective standards.

IPES' official purpose is not to preserve a Tahoe wilderness (which has probably been already lost for over a century) or even a diluted form which author Gretel Ehrlich calls a "wildness" in her book, *The Solace of Open Spaces*[2] Ostensibly, IPES has nothing to do with open spaces or greenbelting. IPES stated purpose is to foster the continuing clarity of Tahoe's water. It either helps to accomplish that goal or it doesn't, and this Court has ruled in the First Section of this decision that IPES *is* rationally designed to help achieve that particular goal, which is one goal among many expressed in the Compact. Whatever confiscatory impact IPES may have, it does not come from a covert appropriation of land for public benefit; the appropriation is either overt or it is nothing at all.

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[2] published by Viking Penguin, Inc., New York, New York, 1985.

* * * * *

This, after all these many pages of discussion, leads finally to what the Court feels to be the single most powerful Constitutional challenge which Mr. Kelly's lawyers have effectively mounted. The stage is finally set to place *First English Lutheran Chuch* in the spotlight. The issue may be stated this way: Have four or more of the lots on the Uppaway hilltop been temporarily "taken" since 1987 so as to give Mr. Kelly a right to money damages, the remedy now available to an inverse condemnee?

First English is both peculiar to its own facts and wide-reaching in its effect. In 1957, an evangelical church in Glendale, California purchased a 21 acre parcel in the bottom of a canyon in a National Forest which is part of a major watershed.

Twenty years later, 4000 forested acres in the watershed were destroyed by fire, and seven months after that, a major storm event sent a wall of water and mud down the canyon which caused extensive damage and cost ten people their lives. Fortunately, no lives were lost on the Church's parcel known popularly as "Lutherglen", but all of the buildings and curtilage were destroyed.

A county ordinance adopted after the flood prohibited the Church from reconstructing or improving their retreat, and the Church brought suit. At the close of its case, the trial court non-suited the plaintiff respecting its inverse condemnation claim and this ruling was upheld by the Court of Appeals.

The U.S. Supreme Court, however, reversed the Court of Appeals in an opinion authored by Chief Justice Rehnquist. Assuming *without finding* that the County ordinance had denied the Church all use of its property for several years, the High Court announced clearly for

the first time that the remedy for temporary regulatory takings is *monetary compensation* under the Constitution. The case was remanded back to California for further findings on issues of liability and, if liability were proven, for a calculation of damages.

In an effort to limit its applicability to the case at hand, the TRPA rightly emphasizes that the U.S. Supreme Court's decision in *First English* created only a remedy and went no further. This point was also stressed when the case went back to the California Appeals Court, 258 Cal.Rptr. 893, (Cal.App.2 Dist. 1989) where Justice Johnson stated at p. 897:

> "The United States Supreme Court in *First English* made it abundantly clear the Court was deciding the remedies issue — and only that issue."

He later quoted the following language from the Supreme Court opinion of Chief Justice, Rehnquist:

> "We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. (Citations omitted.) These questions, of course, remain open for decision on the remand we direct today . . . "

The California Court then went on to decide that the Church was *not* denied all use of the property (which had been used previously as a campground) and that the public interest in preventing death and injury from floodwaters overwhelms the private right to construct dwellings. The California Court also noted that the ordinance is an interim measure pending the completion of a comprehensive flood management plan. As it had done on the first appeal, the California Appeals Court

sustained the trial court's dismissal of the plaintiff's inverse condemnation claims. As distinguishable as *First English* might be from *Kelly v. TRPA*, the case is not entirely without application. And while the U.S. Supreme Court did not reach liability issues, the subject is discussed at length by the California court on remand. Concededly, a state appellate court's comments obviously don't have the same force and effect as an opinion of the U.S. Supreme Court, but Justice Johnson offers some telling observations:

> "If there is a hierarchy of interests the police power serves — and both logic and prior cases suggest there is — then the preservation of life must rank at the top. Zoning restrictions seldom serve public interests so far up on the scale. More often these laws guard against things like "premature urbanization", or "preserve open spaces", or contribute to orderly development and the mitigation of environmental impacts. When land use regulations seek to advance what are deemed lesser interests such as aesthetic values of the community they frequently are outweighed by constitutional property rights. Nonetheless, it should be noted even these lesser public interests have been deemed sufficient to justify zoning which diminishes — without compensation — the value of individual properties. *Id.* at 904.

If, as Justice Johnson states, there is a "hierarchy" of police power interests, IPES' objective to preserve water quality would probably have to fall into the "lesser" category of aesthetic interests, which, under Justice Johnson's theory, makes the land use regulation more suspect when weighed against a property right. What is more, Mr. Kelly has had no prior use of the property (at least there is no evidence of camping or other beneficial use of the hilltop during his ownership). The TRPA is

telling Mr. Kelly, temporarily at least, that he simply cannot further build on at least four of his lots.

It is difficult, then, if not absurd, to avoid calling the effect of the TRPA's code of ordinances on the Uppaway hilltop anything other than a temporary appropriation or taking for a public purpose.

There is, however, one fundamental, perhaps pivotal, difference between Mr. Kelly's case and the plight of the First English Lutheran Church. Except for the argument that it is avoiding substantial risks of liability to its guests and invitees, *the Church is deriving absolutely no benefit from the* Los Angeles *ordinance* which temporarily precludes construction of new improvements. In contrast, every single one of Mr. Kelly's lots will eventually diminish in value if Lake Tahoe is despoiled. IPES is a burden, surely, but it also conveys significant *personal benefits* to each landowner it serves. The Tahoe ordinances do not just benefit the public, they specially benefit private property.

This single feature makes the Kelly case vastly different from *First English* because when an observer places the two competing interests on a mental set of scales, and when the package of public benefits is weighed against the burdens imposed on an owner of property, an allowance *has* to be made for the fact that the benefit package *includes* benefits to the property owner himself. Not only are the burdens partially offset in this scenario, but the scales begin to tip in favor of holding the regulation's effects on land use to be non compensable to the property owner because he (or she) too is deriving a partial reward from the regulation. Put another way, the only sensible and defensible way this Court can find to reconcile the competing interests and the conflicting legal precedents is to conduct a weighing of interests approach.

Mr. Kelly would be as unsuccessful as the appellants were in *Penn Central, supra*, if he were to argue that he

is "solely burdened and unbenefitted" 48 U.S. at p. 134. Just as the judgment of the New York Council benefitted all New York citizens and structures, *Id.*, the Compact benefits all Tahoe residents and lots, "both economically and by improving the quality of life", *Id.*

After examining the restrictions on private building and weighing them against the benefits received, the Court reaches the following conclusion:

> AS LONG AS THE BENEFIT RECEIVED BY THE PROPERTY FROM THE ORDINANCE IS *DIRECT AND SUBSTANTIAL* AND THE BURDEN IMPOSED IS *PROPORTIONAL*, THE TRPA CAN FORCE LANDOWNERS LIKE MR. KELLY TO POSTPONE THEIR BUILDING PLANS FOR A *REASONABLE PERIOD* OF TIME.

The terms "direct", "substantial", "proportional" and reasonable period" are underscored because they have special implications. "Direct" and "substantial" simply mean that, taken together, the Regional Plan, the Code of Ordinances, and the Rules of Procedure of the Tahoe Regional Planning Agency are rationally designed, and they are working to achieve the goals of the Compact. The Court has already ruled on the issue of rational design and the early evidence is that the ordinances are helping to achieve their stated purpose of maintaining the unique beauty which is Tahoe's special lure to lot owners and tourists alike.

"Proportional" simply means that the burdens are equably distributed. In the context of IPES, for example, the high hazard lots bear a greater burden than the low hazard lots from a number of standpoints, including land coverage and management practices such as slope stabilization, and so they should. IPES as it now stands is proportional. The term "reasonable period of time" requires a bit more of a context.

Mr. Durbin's analysis of existing data is cogent enough to give the Court grave misgivings over whether the 1987 plan will succeed unless the TRPA links IPES to a chain of other stringent management practices which will further reduce the amount of nitrogen and oxygen entering the Lake. The Court obviously can't say what those measures are or how stringent they need to become, but Dr. Goldman and Dr. Byron have some ideas:

> "A better understanding is needed of the various ways that nutrient pollutants reach the lake. Further information is required to assess how quickly and to what extent fertilizers applied to the basin's lawns and golf courses travel to the lake . . .
>
> Applied research can provide a more sound basis for urgently needed regulation of fertilizer use . . .
>
> A small-scale, but essential, research project could identify the actual magnitude of the sewer line leakage problem. The extent and significance of shoreline erosion requires further investigation . . .
>
> There is a need to characterize the relative amount of nutrient inputs from direct atmospheric loading . . . . (from page 12 of Exhibit SSSS-8).

Every year, Dr. Goldman drops his secchi disc off the back of Mr. Le Conte's boat. Every year, he concludes from his visual observation that the Lake has lost further ground, so to speak. Every year that goes by will record a self-proving or self-disproving chronicle of the efficacy of the Regional Plan for the Lake Tahoe Basin.

The burden/benefit approach the Court has selected may be nothing more than a euphemism for the recognition of a legally permissible building moratorium on certain high hazard lots. Because the Court has given

Mr. Kelly some relief in the Third Conclusion, the Court doesn't really have to reach or decide anything more in this Section than that Mr. Kelly has failed to prove his inverse condemnation claim. Whether and when IPES may become confiscatory (unreasonable) will be a moot issue for Mr. Kelly if the Third Conclusion stands up on appeal.

Indulging in a moment of speculation, however, how much time needs to elapse before IPES becomes Constitutionally suspect? Of course, a problem will never arise if water clarity starts to improve, and as a consequence, the IPES line is moved down. However, that is unlikely. It is more likely, from the evidence, that the TRPA is going to have to get its "hands around" other contamination problems, so to speak, and start regulating them before the water quality will improve and owners of high hazard lands will have the chance to apply for building permits.

Five years was considered a reasonable period of time in *Smoke Rise, supra.* Fourteen years was considered to be clearly excessive in *Urbanization Versailles, Inc. v. Rivera Rios*, 701 F.2d 993 (1983). Of course, those cases stand on their own factual situations, which vary considerably from the case at hand. Nonetheless, is it reasonable to ask a person to wait more than ten years to put his or her lands to a proper use?

* * * * *

The Court's rejection of the *First English* claim also moots a final "takings" issue which received extensive attention at trial and again in the briefs.

Two cases whose captions start with "Penn" are the standout U.S. Supreme Court cases articulating the concept of so-called "investment backed" decisions to acquire real property, and they guide the legal analysis measuring when a diminution in property value is justifiable because of an exercise of police power.

Penn Central Transportation Company v. City of New York, supra, it will be recalled, concerned the decision of a corporation to "swallow" the historic Grand Central Terminal with an overlapping office building rising high above a cantilevered platform over the terminal's roof. Writing for the majority, Justice Brennan concluded that the historic designation did not prohibit the Plaintiff from profitably using the building as it had been used for sixty-five years, which ". . . must be regarded as Penn Central's primary expectation concerning the use of the parcel", 438 U.S. at page 136.

Penn Central borrows heavily from the other "Penn" case, *Pennsylvania Coal Co. v. Mahan*, 260 U.S. 393, 43 S.Ct. 158 (1922) where it became commercially impracticable to exploit some subsurface coal mining opportunities when a Pennsylvania statute prohibited mining activities which might cause houses to subside. Since the coal company had deeded away the surface rights that supported the houses, it could have "expected" the regulation result as part of the downside risk of its contracted bargain; *see also*, another more recent coal mining case, *Keystone Bituminous Coal Ass'n., v. De Benedictus*, 480 U.S. 470, 107 S.Ct. 1232 (1987).

At trial in this case, witnesses disagreed vehemently over what Mr. Kelly's investment expectations were: whether he sought only to recapture his investment and provide himself and his family with a home; whether he in fact has done far better than that (as the TRPA claims); whether he has lost money (as Mr. Walsh claims). Appraisers were all over the map, so to speak, on their selection of sites for comparable sales analyses and evaluations.

This, however, doesn't matter. This controversy does not have to be adjudicated. The Court has ruled that the IPES ordinance is valid and that no inverse condemnation has taken place. The "Penn" cases and their progeny should be used as benchmarks only when it is

otherwise unclear if the ordinances are reasonable or unreasonable, confiscatory or not. The court does not need to reach out to investment-backed expectation criteria to decide this case.

* * * * *

The Court's Second Conclusion, which is perhaps more purely a legal conclusion than the First, is found on the next page.

VII. SECOND CONCLUSION

NEITHER THE 1987 REGIONAL PLAN FOR THE LAKE TAHOE BASIN NOR THE CODE OF ORDINANCES, NOR ANY PREDECESSOR PLAN OR ORDINANCE, HAVE DEPRIVED MR. KELLY OF HIS INTEREST IN PROPERTY IN A MANNER REQUIRING COMPENSATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VIII. THIRD DISCUSSION; THE "ADJUDICATED RIGHTS' CONTROVERSY:

The two previous legal conclusions leave one final issue unresolved: Has Mr. Kelly established some kind of prior adjudicated preference or right by reason of Judge Thompson's "deemed approved" order in the prior litigation and, if so, is Mr. Kelly partially exempt from the full force of the 1987 ordinances?

In a pre-trial order partially granting summary judgment, this Court ruled that Mr. Kelly cannot claim direct ownership of a "vested right", as that term has come to be defined, since almost all decisions establishing a vested right require the landowner to prove that his project has developed to the point where building

permits have issued, *see, Fernhoff v. Tahoe Regional Planning Agency*, 622 F. Supp. 121, 123 (D.Nev. 1985), *aff'd.* 784 F. 2d 284 (9th Cir. 1986).

Mr. Kelly's counsel argues that the time has come to adopt a less harsh test for "vesting", citing a well-written Hastings Law Review article (at 27 Hastings L.,R. 623) and a 1976 Southern California case, *Avco Community Development v. South Court Regional Planning Commission*, 553 P.2d 546 (1976). Perhaps administrative decisions short of building permits *will* suffice under certain circumstances, but *AVCO* offers no guidance on the degree of "specificity and definition" of what might be termed a "functional equivalency" to a building permit, because in *AVCO* the developer had wholly failed to even file a precise and detailed building application. Since *Fernhoff* is primary authority, this Court (which operates at the trial level) declines an opportunity to modify the enunciated limits of the vested rights doctrine upheld by the Ninth Circuit Court of Appeals. Rule changes are for appellate courts.

Mr. Kelly also relies heavily on the two *Leroy Land* cases, but they too are inapposite. The Ninth Circuit did *not* overrule the District Court in *Leroy I* (543 F.Supp. 277) (1982), because the case was settled before the appeal was heard, reserving for further litigation a legal point which the lower court recently decided in *Leroy II* (CU-R-81-202 ECR (1990)). And *Leroy II* is really little more than a specific application of the *Nollan* doctrine.

There, the Federal District Court found an insufficient nexus between the 1987 Plan and a requirement to pay *hundreds of thousands* of dollars for *off-site* measures having little if anything to do with Leroy Land's Bitterbrush project. The *Leroy Land* cases do not change the law of vested rights; they simply extend the *Nollan* doctrine.

Vested rights issues notwithstanding, these parties have already been in Court over this subdivision on

several substantive issues, and the precedents established therein have become the law of this case unless intervening circumstances or laws dictate otherwise. Mr. Kelly's counsel accurately cites a rule in this State which has been extant now for over a century; once a matter has been "fairly tried" by a "competent tribunal", it is over. *See, Lee v. McLeod*, 17 Nov. 103, 28 Pac. 124 (1882) (quoted at p. 18 of Plaintiff's Opening Post-Trial Brief.)

TRPA argues, in reply, that Mr. Kelly has hoisted himself by his own petard, so to speak, because counsel claims he has been dilatory:

> Indeed, if Kelly, because of the Thompson decision, is blessed with immunity to regulations enacted well over a decade later, we can cast to the wind any planning effort, such as IPES, regulating the timing of building and the amount of land coverage on vacant subdivision lots. . . . His repeated delays in proceeding only would be rewarded. (Opening Post-Trial Brief, Part I, p. 39).

This argument is unpersuasive for the same reason Mr. Kelly's pre-1987 condemnation claims aren't persuasive: both parties were doing what they could under trying circumstances. Mr. Kelly planned to improve and sell off units in the subdivision in orderly phases, with the lakeshore lots to go on-line first, the tennis court lots to follow, and finally he turned to the hilltop. No unreasonable delays interrupted this orderly procession until 1982 when he applied for case-by-case review. After that, it was TRPA's turn to slow and then halt progress, until the Federal Court order halted everything. Mr. Kelly is not guilty of laches.

TRPA counters with an assertion sounding somewhat curious from an agency as vigilant as the TRPA has been regulating Uppaway:

> "To be sure, had Mr. Kelly genuinely believed his project possessed some evanescent

> "adjudicated" status, which he now argues, why would he testify — on direct examination — that "in late July of 1982 we applied for a case-by-case review on six hilltop lots and as I recall paid the filing fee of $200.00 per lot." III:429. Why didn't Mr. Kelly just proceed to build?"

Unless the interim negotiations between 1975 and 1982 conferred some new jurisdiction over Uppaway on the TRPA, it is entirely likely that Mr. Kelly did *not* have to apply for a case-by-case review in 1982, just as TRPA counsel now suggests, but TRPA did *nothing* at the time to dispel Mr. Kelly of the notion that he did.

As Mr. Kelly's counsel so aptly notes (on pp. 5 and 6 of his Closing Post-Trial Brief), Article VI of the Compact (in force at the time) provided civil penalties of $5,000.00 *per day* for any ordinance violations. Small wonder that Mr. Kelly chose the conservative course of action (as any law-abiding citizen might have) by filing his application with the Agency for case-by-case reviews.

TRPA should not be criticized for advocating a position contrary to Mr. Kelly's; it's staff obviously didn't like the coverage aspects of the Uppaway subdivision from the outset. Similarly, TRPA had no legal duty to liberally interpret the federal court ruling and tell Mr. Kelly to proceed without a review. By the same token, TRPA should not now be heard to tell Mr. Kelly in retrospect that he probably should have ignored their sabre-rattling and gone forward in 1982 and because he didn't, that he has waived his federal court ruling and advantage by his inaction.

The record is replete with evidence showing good faith efforts on Mr. Kelly's part to complete the hilltop; see, for example, the series of correspondence running from Exhibit 1-10 through 1-20. Both sides were uncertain exactly what the continuing jurisdiction of the

TRPA was, both wishing to go forward, with rights reserved if necessary. For example, Mr. Owen states in paragraph 1 of Exhibit 1-15:

> "1. Your clients shall submit, or cause to be submitted, to Gordon Barrett of TRPA staff a copy of all construction drawings and other pertinent information with respect to the proposed construction of improvements relating to Lots 33 through 39 of Uppaway Estates, including the proposed road, TRPA agreement that by submitting such information, or by causing it to be submitted, your clients do not waive or otherwise detract from any legal right or contention possessed or maintained by them; and . . ."

In the penultimate quote from TRPA's opening brief, counsel refers to Uppaway as consisting of "vacant subdivision lots". If that's all Uppaway consisted of when it was "deemed approved", then there would be no issue; there would be no question of any advantage, period.

As a specially-engineered "planned unit development", however, Uppaway is far more than a traditional subdivision. And TRPA knows this:

> "[w]hat was "deemed approved" as Uppaway Estates under Article VI(k) of the 1969 Compact was a tentative subdivision map for 39 vacant, 2,500 square-foot lots *and a permit for "excess coverage" under Section 8.25 of the Land Use Ordinance.* (Emphasis supplied) (Opening Brief Part I, p. 44).

When Uppaway became legally approved, the subdivision map was not just a device which created new and smaller parcels from a larger parcel. The "approved" permit stated exactly how many rooftops, roadways and driveways would interfere with the natural

state of the topography and the nitrogen and phosphorus absorbing features of the soil and vegetation.

Although it's pagination is poor, Section H of the Ray Smith report (Exhibit 39) contains the "heartwood" of Mr. Kelly's 1974 application and allows for 4.88 acres of coverage (212,900 square feet), which was approximately 4% more than what land use ordinances were allowing at the time and probably 7% to 9% more than what the ordinances would now allow. This Court thinks and concludes that the land coverage contained in the Ray Smith report represents an already adjudicated issue favoring Mr. Kelly, and the "deemed approved" stamp is what makes Uppaway different from any other subdivision in the Tahoe basin.

If IPES has an affect on the landowner which predominates over others, it is probably in the area of dictating acceptable land *coverage*. So to the extent that land coverage issues under IPES are in conflict with the land coverage issue adjudicated by the federal court, it is this Court's judgment that IPES must give way to the federal court decision.

Nevada has a strong legal tradition sanctioning planners from changing their minds about permissible uses after existing zoning and land use ordinances have encouraged a developer to invest substantial sums in reliance on prior representations, (*see* for example, *City Council, Reno v. Travelers Hotel*, 100 Nev. 436, 683 P.2d 960 (1989)), and the even more recent case of *Nova Horizon v. City Council, Reno*, 105 Nev. Adv. Opinion 18 (No. 165595 Feb. 28, 1989), where the Court's attention was riveted to a use clearly in conformity with a master plan.

TRPA's 1975 approval — even though it was a "deemed" approval and even though it required TRPA's begrudging consent to a federal court order — nonetheless amounted to pretty much of an official master plan for Uppaway. The issue of how much coverage would

be permitted was an integral part of the plan. The ordinances, then, and IPES now, were built pretty much on the same premises of erosion potential cause by slope and soil conditions. The Bailey categories had an important role then, and they do again today. Knowing all about the risks, TRPA gave (was forced to give) its imprimatur to Mr. Kelly's land coverage application; it would have to show compelling reasons indeed, to go back on its earlier undertaking, and the Court finds these reasons lacking in this case.

What is the effect of this ruling?

First, it does not exempt Mr. Kelly from the routine requirements of the 1987 Plan. Mr. Kelly must comply with all current environmental and construction standards, grading ordinances, building site use and preparation regulations, water supply rules, sewage service, tree removal criteria, revegetation, exterior finish, height restrictions, etc., etc.

The non-routine aspects of the 1987 Plan and ordinances, taken together, transmit a rather tangled set of messages to a building aspirant concerning *whether* he or she can build at all, and if so, on how many parcels? *What* size structure is permitted, and *when* may building commence?

IPES, in particular, addresses the latter two categories, because the IPES scoring decision aids planners in knowing when to give approval and, once approved, in factoring the amount of land coverage available under the modified Bailey land use categories.

Since this Court has ruled that the prior federal court ruling is dispositive on the subject of how much land coverage is available to Mr. Kelly (at least in gross square feet), the only legal impediment to Mr. Kelly proceeding straight away to building or selling his hilltop relates to that feature of his IPES scores, which preclude commencing construction on four of the six lots (for the time being anyway) because those lots have

received scores that fall beneath the 725 point cut-off line.

A pretty good argument can be made for forcing Mr. Kelly to wait like everyone else before he commences construction of residences on these four hilltop lots. After all, they are located in a so-called "high hazard" area of generally steep, rocky terrain. Additionally, the prospective nutrient hazard from these lots is made worse by the "excess" coverage available to the forty-four acre parcel. This excess is more than allowed under all past ordinances and is particularly excessive under the 1987 ordinances which incorporate IPES and the modified Bailey standards.

Dr. Goldman and Dr. Byron feel that Tahoe may be approaching an ecological calamity, bending beyond its breaking point so to speak, considering the cumulative effect of nutrient deposits basin wide. However miniscule the relative contribution from these four lots might be, they could potentially tip the scale. They could be scale-tippers, that is, were it not for the engineered infiltration system.

Never, during the period of time the system was designed and installed, did the Plaintiff evidence any callous disregard for the nutrient transport sensitivities of this project. The design which he commissioned for the so-called "offsite" improvements (every place but building pads) was in every respect above-standard: the contractors did a workmanlike job of installing the tilted roadways, the infiltration trenches, the junction boxes and other facets of the system; appropriate warning signs telling people to stay off the rocks are strategically placed on roadways; the asphalt appears evenly sloped and well-maintained.

Mr. Ziegler has every reason to cast a wary eye on man-made mitigation measures such as the infiltration trenches. He reports many examples of instances where man's efforts to improve upon or install substitutes for

natural processes of nutrient uptake have been disastrous and so does Mr. Morgan (*see* for example, Exhibit AA which is the log of 35 mm. slides which Mr. Ziegler prepared and in particular, slide 12 showing erosion and sediment at Biggler Circle and slide 44, a destroyed filter fence at the south shore. Other examples can be found in Exhibit Z-13, the videotape authenticated by Mr. Morgan).

In the same slide show, Mr. Ziegler pointed to problems with erosion sediment transport and revegetation around infiltration trenches at Uppaway. The Court has no doubt that Mr. Ziegler is right when he maintains that, left unmonitored, the effectiveness of the system of trenches could be destroyed in a matter of years, particularly by filling and compaction.

On the other hand, there is absolutely no evidence that the infiltration system has ever failed, at least in the upper reaches of the subdivision, even though it has been in place now for several years. The hilltop lots are located in places which are as flat as feasible. The lots, themselves, are quite a distance from the shores of the Lake and migrating water, even subsurface flows, would have to pass through a portion of the redundant system, as well as through several hundred feet of fairly heavily vegetated open space before reaching the lake. As long as the infiltration trenches are cleaned and maintained, the evidence shows that the likelihood that lots 33-38 would generate nutrient transport reaching Lake Tahoe is practically non-existent.

A housekeeping detail. The Court didn't hear much evidence concerning Mr. Kelly's dispute with the homeowners association, but as far as the hilltop alone is concerned, it would not be unreasonable for the TRPA to exact a performance bond of some kind, assuring (upon default of a maintenance covenant) a fund to regularly clean up and maintain those sections of the infiltration system abutting and accessing the hilltop. Eventually, it

would be a good idea to make such standards uniform for all of Uppaway.

* * * * *

Only two sub-issues remain. The first relates to Mr. Kelly's claim that a seventh lot, lot number 39, was taken from him by the TRPA without compensation or, if not, he claims that at the very least TRPA breached a mostly verbal contract arising from the "wrap-up" negotiations initiated in 1981 by Mr. Lahman.

It should be noted parenthetically, at least, that the Statute of Frauds probably defeats the parol contract claim, c.f. NRS 111.220(1), unless Mr. Kelly can prove some kind of estoppel exception to this doctrine. However, an estoppel argument fails for the same reason that the "taking" argument fails: both require proof of a lack of compensation or benefit to the claimant. Mr. Kelly received direct benefit and indirect compensation from the negotiations, even if he didn't get the hilltop building approvals. The list of actual and valuable consideration flowing to Mr. Kelly from the negotiations and the amended mapping process before, during and after 1982 is fairly lengthy:

1. He reconfigured the square-shaped pads on the lakefront so that they could accommodate the beautiful homes that now dot the shoreline. Their value was considerably enhanced in this process.

2. He eliminated the funicular access to the hilltop. Its elimination had not only become a Douglas County requirement for fire road purposes, but at least one appraiser, Steven Johnson, felt that the funicular diminished the value of the homes by as much as 25%.

3. He "borrowed" coverage from some areas such as the tennis court, and he "spent" it elsewhere.

4. He relocated some of the hilltop lots to areas where they created less of a relative erosion hazard than before, which, as it turns out, plays a significant role in the Court's determination to allow construction to proceed despite some of the IPES point scores. If they were in more hazardous locations on the ridge, TRPA's argument that Mr. Kelly should suffer the IPES staging process becomes a much more forceful one.

The Court cannot find any evidence of an enforceable promise by the TRPA that it would approve hilltop construction in exchange for the concessions made in July of 1982 memorialized in the Seventh Amended Map (*see* Exhibits 43 and 44). Mr. Kelly voluntarily signed the document (Exhibit 43) which erased lot 39. No express conditions precedent are of record. Both sides gave something and both sides took something as Uppaway developed.

As a final housekeeping detail, one aspect of the magnitude of the Court's "grandfathered land coverage" decision needs to be addressed. Conflicting evidence supports conflicting conclusions concerning the current scope of impervious surfaces covering Uppaway. Mr. Mahannah did a survey of sorts for his purposes but offered differing opinions on direct and cross-examination, a situation which did not go unnoticed by Mr. Owen (*compare for example* footnote 5, Part 1 Opening Brief p. 6 and Exhibit 7-19). Discussion by TRPA staff and board members when the funicular was changed to a roadway indicated that there was no net change in land coverage there, but the Court is not so sure. Certain parking lots, driveways, construction pads have all been changed since 1976, and the road leading to the water tank has been torn up so the Court can't say how much proportional reduction in coverage, if any, is necessary to assure that the six building envelopes don't exceed the gross adjudicated impervious coverage limits.

To resolve this issue, an independent study or survey will probably have to be commissioned, unless the parties can agree (which is probably wishful thinking).

* * * * *

The Third (and final) Conclusion which this Court has reached in respect of Mr. Kelly's claims appears in boldface on the next page.

IX. THIRD CONCLUSION

THOUGH HE DOES NOT POSSESS A VESTED RIGHT TO BUILDING APPROVALS FOR LOTS 33-38, ONLY ROUTINE ASPECTS OF THE 1987 PLAN AND ORDINANCES APPLY TO MR. KELLY, BECAUSE UPPAWAY'S "DEEMED APPROVED" STATUS GRANDFATHERS LAND COVERAGE ALLOCATIONS AND BECAUSE EFFECTIVE MITIGATION MEASURES ALREADY IN PLACE CAUSE NO JUST REASON FOR FURTHER IMPEDING THE BUILDOUT OF HIS PLANNED UNIT DEVELOPMENT.

X. CONCLUSION

As Dr. Margaret Davis suggests, Tahoe is a "world class" lake. Along with Russia's Lake Baykal, it has perhaps no equal, at least in the developed world.

Like an endangered species, the homes and habits of individuals are threatening Tahoe's sparkling environment. Concerned people have stepped forward in the past, but the planning effort has been marred by foibles and forensics as much as it has been marked by any real progress.

As Tahoe advances toward the 21st Century, it is caught inexorably between the competing demands of those who would build and those who would prevent building, between those who would come to visit and those who would come to stay. Its shores are blanketed by a crazy quilt of public and private ownership. Its time as a world class lake may be running short.

Now there is a new plan. Even before the plan gets underway, however, Mr. Kelly would have it scuttled. From their decks, his allies have loosed a broadside volley of legal and scientific cannon-fire, claiming that the plan is rudderless and will take Tahoe's rehabilitation efforts off course. After examining the evidence, this Court feels that Mr. Kelly's projectiles have missed their mark. The plan makes sense. Surely, new canvass needs to be stitched to the mainsail to make the plan seaworthy, but the ribbing and planking giving structure to the plan are solid enough.

While the Court has found the new plan to be sensible and fair and, for those reasons, essentially untouched by this decision, it is also sensible and fair to force Tahoe planners and governments to honor their previous Court ordered commitments to William Kelly. He has proven that he poses the Lake no harm.

* * * * *

Except as they might be inconsistent with this Decision, the legal conclusions entered in the Court's Order Partially Granting and Partially Denying Motions for Summary Judgment are ratified and confirmed. The State Defendants are dismissed as part of the final judgment. TRPA counsel are directed to prepare formal findings, conclusions and judgment consistent with the Summary Judgment Order and First and Second Discussion Sections and Conclusions; Messrs. Walsh and Yaple will do likewise for the Third Section and Conclusion, and after their respective work products are

shared, submit them to this Court for final review and execution.[3]

DATED this 12th day of July, 1990.

s/s Charles M. McGee
DISTRICT JUDGE

[3] I'd like to thank the law clerk I "borrowed" from Judge Robison, Don Wynn, my own law clerk, Joan Osborne, and particularly, Judge John Petty, Discovery Master for the Second Judicial District Court, for their help in this case. Among other contributions, Judge Petty spent days with counsel working through difficult discovery issues to get this case ready for trial.

Case No. 18325

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

WILLIAM CODY KELLY, TRUSTEE
Under Trust Dated December 12, 1962,
Plaintiff,
vs.
STATE OF CALIFORNIA, STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY, et al.,
Defendants.

EXPLANATORY ORDER CONCERNING THE AWARD OF COSTS AND UPPAWAY COVERAGE

INTRODUCTION

For various reasons (principally Uppaway's coverage issues which required additional engineering studies and a major dispute over the award of costs), well over a full year has elapsed since the Decision in this case was handed down on July 12, 1990.

Even in a case of such magnitude and complexity, the Court feels that too much time has now elapsed since trial. Justice requires an end to the continuing advocacy in this case, at least in the trial court. Accordingly, the Court is, *sua sponte*, cutting off further pleadings and arguments and intends by this Order to resolve the issues that remain. Simultaneously, the Court will cause the filing of its Findings of Fact, Conclusions of Law and final Judgment.

SOME GENERAL AND SPECIFIC COMMENTS ABOUT COSTS:

In his lawsuit, Mr. Kelly asked the Court to declare the remaining lots in the subdivision owned by his Trust to have a special legal status which exempts them from many of the rules and practices promulgated by the TRPA since the subdivision was created. He wanted a priority status declared for those purchasers who might wish to build residences on his hilltop building sites. In the main, the Court agreed with this narrow assertion and granted Mr. Kelly some relief. By itself, the Declaratory Relief action would have required perhaps a week or less for a full resolution. Clearly, however, Mr. Kelly sought to accomplish more by his lawsuit — much, much more.

On top of the simple Declaratory Relief claims, Mr. Kelly mounted an impressive but losing inverse condemnation lawsuit and, expending enormous additional time and talent, he launched as well a wholesale challenge attacking the actions of TRPA for the last decade and the underlying scientific theories for TRPA's most recent regulatory system, IPES. The trial took not one, but five weeks to try, with more than a score of expert witnesses. Both the TRPA and the State of California are entitled to costs for having successfully defended these inverse condemnation claims and other jurisdictional attacks on their activities. The question is, what award is fair?

In this connection, subsection (5) of Nevada Revised Statutes 18.005 seems to give the Court a wide latitude and discretion in determining reasonable fees. By including a flexible ceiling on fees in the amount of $1,500.00 per witness, it also seems to contain an implied caution to limit the unapproved proliferation of expert witness fees. The Court also chooses to interpret this statute as allowing the Court to determine [reasonable] fees not only from the standpoint of the services rendered and the direct rate charged by the expert, but perhaps reasonable also from the

standpoint of the resulting burden on the payor, considering all the special circumstances of the case *see* NRS 18.050 and *Magee v. Whitaker*, 60 Nev. 202 at p. 205 (1939) (discretion given in actions in equity).

Together, the TRPA and the State of California are seeking costs in this case of $339,373.22. Of that figure, the bulk of the claim relates to costs associated with expert witness fees, especially those including:

Expert Witness:	Actual Fee:
Mr. Kenneth Foster	$15,111.01
Stephen Jonhson	$26,919.68
William Morgan	$ 9,098.17
Milt Sharpe	$ 7,004.08
Martin Townsend	$ 7,613.13
Dr. Thomas Cahill	$ 7,714.00
Mr. David Dawdy	$20,557.55
Dr. Thomas Dunne	$29,158.55
Dr. Charles Goldman)	
Dr. Earl Byron)	$58,884.28
Mr. Lawrence Livingston	$12,357.45
Dr. Robert Twiss)	
Dr. Robert Costs)	$81,509.41
TOTAL	$275,927.31

If a Court were to mechanically award all prayed-for costs to the prevailing party in every case, a situation could result where a person of little means would be unfairly penalized for having initiated a lawsuit in good faith. Obviously, that precise situation does not apply here. Surely, neither Mr. Kelly nor his Trust are paupers. On the other hand, a portion of their lawsuit may be looked at as having performed something of a public service for a number of factions interested in development in the Tahoe Basin and other factions interested in controlling growth. The case was tried as something of a "test" case.

With all of these considerations in mind, the Court has determined to limit the award of costs for experts to the sum of $20,000 for each of the several experts named above whose statements exceed that figure. Accordingly, the Court is retaxing the costs to the figure of $198,897.84, computed as follows:

See landscape Table, page C-5.

The Court has also chosen to disallow Mr. Beather's fee of $352.00 and the fee of Cartlidge Steel & Company for $155.00, and the sum of those figures, $507.00, will be deducted.

Finally the Court is going to make a further adjustment reflecting a credit to the Plaintiff by reason of some of the expert witness testimony expenses incurred by the *Plaintiff* during the presentation of his evidence on issues involving adjudicated rights, however small by comparison those fees might seem.

Indulging in assumptions which the Court feels are most favorable towards the Plaintiff, certainly no more than 25% of Mr. Durbin's and 25% of Mr. Mahanna's time could be said to be "on site" work in the sense that they were examining the exact system at Uppaway for the purpose of establishing Uppaway's need to be eliminated from the allotment process represented by IPES. The Court has never seen a statement for either Mr. Durbin or Mr. Mahanna, but the Court suspects that both probably exceeded by several times the $20,000.00 ceiling.

Expert Witness:	Actual Fee:	Reduced By:	Final Award:
Mr. Kenneth Foster	$15,111.01	0	$15,111.01
Stephen Johson	$26,919.68	$ 6,919.68	$20,000.00
William Morgan	$ 9,098.17	0	$ 9,098.17
Milt Sharpe	$ 7,004.08	0	$ 7,004.08
Martin Townsend	$ 7,613.13	0	$ 7,613.13
Dr. Thomas Cahill	$ 7,714.00		$ 7,714.00
Mr. David Dawdy	$20,557.55	$ 557.55	$20,000.00
Mr. Thomas Dunne	$29,158.55	$ 9,158.55	$20,000.00
Dr. Charles Goldman) Dr. Earl Byron)	$58,884.28	$18,884.28	$40,000.00
Mr. Lawrence Livingston	$12,357.45	0	$12,357.45
Dr. Robert Twiss) Dr. Robert Coats)	$81,509.41	$41,509.41	$40,000.00
	$275,927.31	$77,029.53	$198,897.84

Using the same rationale as used for the Defense experts, the Court has determined to award Plaintiff $5,000.00 each for Prof. Mahanna and Mr. Durbin. Similarly, the Court sets as reasonable fees which are site specific at Uppaway for Mr. Guerrant's work the amount of $5,000.00 (1/4 of the ceiling). Additionally, fees for Mr. Naphan are awarded in the amount of $5,000.00 (most of his work). The total $20,000.00, will constitute a further reduction in the award of costs to the prevailing Defendants.

All of the remaining costs, while neither normal or customary in a strict sense, represent costs which could be expected to be incurred in the handling of the defense in a case as extraordinary and wide-ranging as this case. They are awarded in full. The Court sides with the State of California and the TRPA on their interpretation that the new statute changes the doctrine set forth in *Maxwell v. Amoral*, 79 Nev. 323 (1963).

Accordingly, costs in the amount of $241,836.69 are awarded to Defendants State of California and the Tahoe Regional Planning Agency. For the reasons set forth in this Court's Order of February 20, 1991, fees in the amount of $7,500.00 are also allowed as a form of sanction.

SOME GENERAL AND SPECIFIC COMMENTS CONCERNING COVERAGE ISSUES:

The Court has examined the Plaintiff's report on coverage at Uppaway, including the three major appendices which are annexed thereto. The Court has also examined the Defendants' report of land coverage calculations for Uppaway Estates Subdivision and the contentions and studies therein.

In order for the Court's conclusions to make sense, two initial decisions are first necessary. First, the Court sides

with the TRPA and California and rules that the benchmark which should and must be used in this case is not the July 1974 Ray Smith report, but the Novembe. Ray Smith report, which was introduced and admitted at trial.

On the other hand, the Court sides with Mr. Kelly on the issue of whether or not approximately 12,200 sq. ft. of coverage which doesn't appear anywhere in Mr. Smith's calculations should be "grandfathered" in the sense that it has until now played no role in the case and should play no role in calculating the remaining coverage. There is no evidence that Mr. Kelly was, at any time, intentionally overreaching when Mr. Smith made this oversight. And it is fairly easy to charge the TRPA with constructive knowledge of the existing amount of impervious coverage in place at the time the Ray Smith report was filed and the subdivision was "deemed approved". Furthermore, Uppaway was basically in a condition where that amount of impervious coverage was already interfering with natural drainage at the time Mr. Kelly commenced his application process. The TRPA should, as well, live with these historical facts. And, to be consistent, the same treatment needs to be accorded to the footpath to the pier and the 2,310 square feet of compacted earth located at that site.

One final preliminary note. With the comments just made, the parties are not terribly far apart in the manner by which they calculate existing and remaining coverage, although they go about the process quite differently. The Court appreciates the fact that TRPA did combine its map study with on-site measurements and the Court chooses to utilize most of TRPA's interpretations and numbers for its final conclusions

If sixteen lots remain of the original thirty-nine and the existing residential coverage is added to so-called "new development" coverage and so-called "recently approved coverage" and then the total is subtracted from the Ray

Smith November report, there exists, by the Court's calculations, more coverage remaining than is necessary for the purpose of allocating 2,500 square feet per remaining hilltop lot (even with lot 39 coming back into existence) — which is the size of the original building envelope according to either Ray Smith report. The only real difference is that by making some allowances for previous built-out coverage, the hilltop lots would be left with enough space for a driveway perhaps the size of a carport (approx. 380 square feet) which is concededly less than the average driveway allowance to the lower lots under the Smith report.[1]

Expectedly, Mr. Kelly's counsel has seized on the argument that the Trust is entirely innocent in causing any excess coverage that may have occurred as the result of actual building practices by other purchasers, particularly near the lakefront. And, on those lots where full coverage was not utilized, Mr. Kelly's counsel seeks to appropriate the unused portions.

On the other hand, if the Court's decision stands up on appeal, the Uppaway hilltop lots will be given a status allowing purchasers to proceed to buildout in the IPES environment of staged growth without further delay. As it is, Uppaway's building-envelopes represent a variance on coverage substantially exceeding the coverage limitations established by the TRPA at any time.

It is the Court's opinion, then, that if Mr. Kelly wants to sell houses with larger driveways, then perhaps he should

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[1] 212,900 square feet (Nov. Ray Smith report total) minus 181,286 square feet (TRPA calculated coverage) equals 31,614 square feet. Add back 12,203 square feet (pre-existing residence coverage; changes to Downer actual) plus 2,310 feet (compacted path, pre-existing) equals 46,127 square feet. Divide by 16 (number of lots remaining) equals 2,883 square feet (gross allowance per building site). Subtract 2,500 for the actual residence and the result is 383 square feet for the driveway; rounded to 380 square feet.

wait until his lots are afforded better IPES scores. If he wishes to stay with smaller driveways, however, then Mr. Kelly will maintain his hard-won priority. A number of alternative uses, especially engineered grates, are available for non-offending driveway substitutes and some are already in use in Uppaway. The burden to Mr. Kelly represented to have his purchasers suffer some loss of driveway coverage in an area originally designated for cart paths may be substantially outweighed by the benefit he and TRPA receive by not grossly exceeding the original coverage limitations. After all, this subdivision was engineered as a whole to handle a specified amount of runoff at critical periods and the Court is not inclined to surcharge the use for the mere purpose of assuring spacious parking areas, especially when the lake basin ecological balance is at such a critical juncture. [Actually, if the Court had the power, it would order some mitigation work to be accomplished around the pier and pier path because there is evidence of algae blooming in higher proliferation in that area. But such relief appears to be outside these parties and pleadings.]

Accordingly, Mr. Turner, or some other qualified person of Mr. Kelly's selection, may prepare a new plat map depicting the locations of lots 32 through 39 with 2,500 sq. ft. for the building site and an additional 380 sq. ft. of driveway coverage per lot.

DATED this 1st day of November, 1991.

/s/ Charles M. McGee
DISTRICT JUDGE

Case No. 18325
Dept. No. I

IN THE NINTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

WILLIAM CODY KELLY, TRUSTEE
Under Trust Dated December 12, 1962
Plaintiff,
vs.
TAHOE REGIONAL PLANNING AGENCY, et al.
Defendant.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND JUDGMENT

INTRODUCTION:

This matter came on for trial starting on the 5th day of February, 1990, and was completed on the 6th day of March, 1990. The Plaintiff was represented by Daniel R. Walsh, Esq., and Jon Yaple, Esq. The Defendant Tahoe Regional Planning Agency was represented by Gary A. Owen, Esq., and J. Thomas Susich, Esq., of the firm of Crowell, Susich, Owen & Tackes, Ltd. The Defendant State of California was represented by Richard Skinner, Esq., Deputy Attorney General for the State of California. The Defendant State of Nevada was represented by Marta Adams, Esq., Deputy Attorney General for the State of Nevada. The court considered the extensive testimony presented at trial, the numerous documents and other items of evidence admitted and the briefs and arguments of counsel, and thus being fully advised in the premises hereby enters its Findings of Fact, Conclusions of Law and Judgment as follows:

FINDINGS OF FACT FOR PARTS I AND II OF THE COURT'S DECISION:

1. In 1963 William Cody Kelly [Kelly] heard about the studies of the Fleischmann Foundation toward creating an interest in regional planning at Lake Tahoe and was aware at that time of the discussion of perhaps creating an interstate agency to address problems that were occurring at the Lake.

2. The William Cody Kelly Trust [the Trust] acquired 44 acres of property adjacent to Lake Tahoe in Douglas County, Nevada, from the heirs of Sara Hamilton Fleischmann in September of 1966 for $500,000. [The Kelly property will be referred to as "Uppaway" from this point forward].

3. Uppaway was originally acquired to serve as a personal residence for Kelly, however prior to acquisition Kelly explored its development potential with a real estate brokerage firm. Kelly was advised that the property's ultimate value after development would be between $500,000 and $1,000,000. Kelly wanted to make sure that, when spending a sum of $500,000.00 for a residence, he could recover his investment in the property. If he could not sell the undeveloped land with existing residence to another person for $500,000.00, a means to recoup his investment would be through subdividing the land. Planking Area Statement No. 059, applicable to Uppaway, allowed single-family residential development at a density of one residential unit per acre.

4. At the time of Kelly's purchase of the 44-acre parcel, there existed on it the Fleischmann Mansion or "main house", comprising lot 19 of the present subdivision. The mansion was an object of Kelly's desire for a residence prior to his purchase of the land.

5. Kelly moved into the mansion in May of 1966 under a four-month lease-option to purchase. Kelly lived in the residence with his family from 1966 until 1984. He continued to maintain a residence in the guest house on lot 17, but at the current time he lives in Ohio. Apart from the

Fleischmann Mansion, when Kelly purchased the 44-acre parcel it also contained a caretaker's residence (lot 7) and the guest house on lot 17.

6. The Tahoe Regional Planning Agency [hereinafter "TRPA"] was formed by the States of California and Nevada and the United States of America through a bistate compact in 1969. The 1969 Compact found a need, "to maintain an equilibrium between the region's natural endowment and its man-made environment, to preserve the scenic beauty and recreational opportunities of the region . . ." and to establish "an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development. . . ."

7. Under the 1969 Compact, TRPA enacted a land use regulatory scheme requiring that local governments issue permits for projects in accordance with TRPA's regional standards. In doing so, the local governments were intended to utilize their own procedures but be bound by the substantive regional standards enacted by TRPA. The scheme also required TRPA to review permits for major developments and variances. TRPA's authority to approve or deny a permit, however, was only fully exercised to the extent the TRPA Governing Board could muster a dual-majority vote under art. III(g) of the 1969 Compact. In other words, the TRPA could not act without an agreement on action by a majority of both states' delegations to the Governing Board.

8. Kelly first attempted to subdivide Uppaway in 1974. Kelly submitted plans and maps to TRPA, approved by Douglas County, which depicted a Planned Unit Development [PUD] consisting of approximately 39 lots ["lots" refers to a 2,500 square foot building envelopes within the PUD] to be constructed in three phases. The property not contained within the Lots is common property within the PUD. The proposal was presented to the governing board of TRPA as a "major development" and received the following vote:

Five California Delegates Against
Two Nevada Delegates Against
Two Nevada Delegates For
One Nevada Delegate Absent

9. TRPA maintained, in an action before the Federal District Court for the District of Nevada, that this vote amounted to a disapproval of the PUD. The Court disagreed as reflected in an order entered on October 24, 1975 holding that under Article VI(k) of the 1969 Compact the action of TRPA amounted to "no action" and that the subdivision was "deemed approved" under the "dual majority rule".

10. In July of 1977 Kelly created Uppaway Development Company, a Nevada Corporation [UDC], and had the trust convey 28 of the 39 lots to it while retaining ownership of the remaining 11 lots. Kelly was president of UDC from its creation until he resigned in 1984. He was also a member of the board of directors until his resignation as president in 1984. The corporation was set up by Kelly upon advise of counsel. Kelly gradually transferred UDC's shares to his children and grandchildren, as part of his estate planning.

11. The eleven lots, which the trust retained, were the following:

A. The Hilltop Lots known as lots 33 through 39. All of these Hilltop Lots lie within phase three of the PUD.

B. Lot 7, the caretaker's home near the entrance.

C. Lot 17, the existing guest house, for which Kelly was asking the sum of $195,000.00 in 1989.

D. Lot 19, the Fleischmann Mansion, which later sold for $1.1 million.

E. Lot 32, a shoreline lot and foundation which was late sold for $522,500.00.

12. Phases one and two of the PUD were substantially completed and most lots within those phases were sold.

13. Kelly has derived substantial economic benefit from the development of Uppaway Estates of which the Hilltop Lots are a part.

14. In 1980 the TRPA Compact was amended by the Nevada and California Legislatures and the United States Congress. The amended compact deleted the dual majority rule and mandated that TRPA adopt environmental thresholds in order to protect Lake Tahoe.

15. On August 25, 1981 TRPA Ordinance 81-5 went into effect implementing the Lake Tahoe Regional Water Quality (208) Management Plan. Under the terms of this ordinance a planning team was appointed to evaluate all subdivisions within the Nevada portion of the Lake Tahoe Basin. This team was required to inspect all Nevada subdivisions and rate them for purposes of determining their compliance with the plan.

16. Under the then existing procedures case by case review of building lots and approval of building permits could be conducted only within subdivisions which had been rated as adequate or potentially adequate under TRPA Ordinance 81-5.

17. Uppaway was evaluated and it was determined that phases one and two were potentially adequate. Phase three was rated as being in need of further consideration because the subdivision improvements as to phase three had not yet been constructed.

18. On October 29, 1981 Kelly was specifically notified that the Hilltop portion of the PUD had been rated as in need of further consideration. He was advised of the method for appeal of the determination.

19. Kelly was notified once again of the phase three evaluation in a letter dated January 21, 1982 and once again was specifically advised of the appeal procedure. These notifications advised Kelly that he could not proceed with case by case review of the Hilltop lots until phase three received a rating of adequate or potentially adequate.

20. Sometime during the Fall of 1981, Robert Lahmann, an employee of Mr. Kelly, contacted TRPA with proposed modifications to the Hilltop. Mr. Lahmann proposed moving various lots, eliminating some lots and converting the rail access system [funicular] to the Hilltop into a roadway. Similar proposals had been make by Kelly through his counsel as early as the late 1970's.

21. Mr. Lahmann's proposal was reviewed and he was advised by letter dated December 23, 1981 that the proposal would have to be submitted in the form of an application to modify the Uppaway map and improvement plans.

22. In 1982 TRPA adopted its Environmental Threshold Carrying Capacities as mandated by the 1980 compact. Included in those thresholds were standards for water quality, both in Lake Tahoe and in its feeder streams, and for soil conservation, including the amount of impervious surface which could be created without undue stress upon the environment.

23. A meeting was conducted on June 4, 1982, in the offices of Governing Board Chairman Bennie Ferrari concerning the proposed changes submitted by Mr. Lahmann. Mr. Kelly was represented at the meeting by attorneys William T. O. Aird and Paul Hogan of the law offices of Daniel Walsh. Also present at the meeting were Gary Owen, TRPA's attorney, and Gordon Barrett, a TRPA employee.

24. During this meeting Mr. Kelly's representatives argued for the changes. Kelly was most concerned that the changes not be viewed as "substantial" in order to avoid having to have the matter reconsidered by the TRPA Governing Board.

25. It was agreed at the meeting that Kelly's proposed changes, including the elimination of Lot 35, would not be considered "substantial" by TRPA and that Kelly could proceed without submitting the change to the Governing Board.

26. Shortly after the meeting Kelly informed TRPA that he wished to eliminate lot 39 rather than lot 35. This change was agreed to by TRPA in a letter dated June 23, 1982 from Barrett to Walsh.

27. On July 22, 1982 Mr. Walsh sent a letter to TRPA memorializing the agreement regarding the changes. This letter was signed by Mr. Barrett and Mr. Ferrari. The letter provided that Kelly would have to follow the normal case by case review procedure before building permits could be approved.

28. On July 27, 1982 Kelly submitted applications for case by case review concerning Lots, 33, 34, 35, 36 37 and 38. No appeal concerning phase three's rating of "in need of further consideration" was filed.

29. The case by case review office had numerous applications before it during the Fall of 1982. In January of 1983 Mr. Walsh was notified by TRPA that on site inspection of the lots would have to be delayed due to the heavy snow which occurred that year. On February 9, 1983 Mr. Walsh acknowledged the snow problem in a letter to TRPA.

30. In July of 1983 Mr. Walsh sent a letter to Louis R. Doescher, TRPA's attorney, complaining that he thought that phase three had been rated as adequate under the subdivision review procedure outline in Ordinance 81-5. Mr. Walsh felt that by allowing subdivision improvements to phase three to be constructed, TRPA was admitting that it was adequate under the ordinance. Ordinance 81-5 provides that a rating of adequate or potentially adequate can be given only after the subdivision improvements have been constructed and inspected.

31. TRPA continued to attempt to complete the case by case review of the lots during the Summer of 1983. On July 21, 1983, TRPA offered to work with Kelly to attempt to have the subdivision inspected during the Summer of 1983 in order to try to gain a potentially adequate rating.

32. On August 26, 1983 the Governing Board of the TRPA adopted a moratorium preventing further evaluation of case by case applications until adoption of an Amended Regional Plan mandated by the 1980 amended compact. This action was based upon the advice of counsel and concern that continued approvals by TRPA prior to adoption of the amended plan would be illegal as being in violation of the compact and would place the property owners themselves in potential jeopardy.

33. TRPA advised Kelly that it would attempt to immediately complete processing of the Hilltop case by case applications as soon as the moratorium was lifted.

34. On October 10, 1983 Kelly completed the subdivision improvements which allowed phase three to be evaluated and rated as potentially adequate.

35. On April 26, 1984 TRPA adopted its Amended Regional Plan. This plan provided under section 4.20 that completed applications on file before August 26, 1983 would be processed under the old procedures. Thus Kelly's application would have been processed if the amended plan had remained in effect.

36. On April 26, 1984, the same day as the amended plan was adopted, suit was filed against TRPA by the Attorney General of the State of California and the League to Save Lake Tahoe in the Eastern District of California. As a result of that suit a restraining order was issued by the Federal Court on or about May 1, 1984, prohibiting TRPA from acting to approve projects under the amended plan. An opinion transforming the TRO into an injunction was issued by the court on June 15, 1984. The actual preliminary injunction order was signed on August 9, 1984. the August 9, 1984 Injunction was appealed by TRPA to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed.

37. In his order converting the TRO into a Preliminary Injunction, the court stated, among other things, that the provisions contained within the 1984 Amended Plan allowing processing of case by case applications under the old plan

[4.20] was in violation of the environmental thresholds, among other things, and thus was illegal under the new compact.

38. TRPA was thus prohibited from processing Mr. Kelly's case by case applications concerning the Hilltop lots by action of the Federal District Court for the Eastern District of California as approved by the Ninth Circuit Court of Appeals.

39. Settlement negotiations were initiated in 1984 between the parties to the federal law suit in order to see if a new plan could be developed which would comply with the compact and environmental threshold carrying capacities.

40. It was decided to create a "Consensus Building Workshop" [CBW] in order to develop a new plan. The CBW was open to all interested persons and included local residents and varied experts and authorities.

41. Lake Tahoe is in many ways unique among the large lakes of world. Considering its surface area and volume, Tahoe has a relatively small watershed which, in its natural condition, produces few nutrients which enter the Lake via the more than 100 streams which flow into Tahoe. As a result, Tahoe is regarded as an ultraoligotrophic lake, and only Crater, Lake, in Oregon, and perhaps Lake Baikal in Irkutsk, U.S.S.R., are comparable large aline lakes in water quality and clarity.

42. The retention time of water entering Lake Tahoe approximates 700 years, meaning that, if sediments or nutrients enter the Lake from any source, it can take about seven centuries before such material may be removed by outflow via the Truckee River, Tahoe's only stream outlet. This lengthy retention time requires a conservative approach to allowing nutrient inputs to the Lake; once such nutrients get into the Lake, they remain there virtually permanently for all human considerations.

43. Since about 1960, when human development in the Basin commenced at high rates, the amounts of phosphorus, nitrogen and trace metals important to algal growth in Lake Tahoe have increased beyond historical levels. Studies by the Tahoe Research Group indicate that the algal growth rate of Tahoe, itself dependent on nutrient input to the Lake's waters, has been increasing at a rate of about 5 1/2 percent per year. As a consequence, Lake Tahoe is losing its famous clarity at the rate of about 1/2 meter per year. Unless this growth rate of nutrient input to Lake Tahoe is halted and even turned around, the Lake may be transformed forever into an ordinary algae-ridden water body in as few as 40 years.

44. When TRPA put together its 1987 Regional Plan it faced a Tahoe Basin which already was significantly committed to development. Large gaming casinos, ski-areas, commercial and residential development with corresponding destruction of important nutrient-stripping wetlands had taken place in the prior three decades. Additionally, more than 17,000 single family parcels, including Plaintiff's, remained in the inventory of unbuilt parcels, many located in environmentally-sensitive areas: steep slopes, wetland, and/or relatively erodible soils. Because the uncontrolled development of all these parcels would likely ensure the permanent loss of Lake Tahoe to eutrophication in the near future, TRPA, pursuant to the Compact, was required to construct a regulatory matrix which included a reasonable and responsible program for governing the future of these undeveloped single family parcels. That program entitled the Individual Parcel Evaluation System (IPES), after development by the CBW, was adopted by TRPA as part of its Code of Ordinances on May 27, 1987.

45. The new plan [1987 Plan], including IPES, went into effect in July of 1987.

46. Kelly was thus required, due to the actions of the Federal District Court for the Eastern District of California, and the subsequent adoption of the 1987 plan, to have his

lots evaluated under the 1987 Plan, which included IPES, before those lots could be developed.

47. Under IPES, TRPA sends a team of experts to evaluate each vacant single family parcel, primarily for erosion hazard and runoff potential. Each evaluated lot receives a score, and then, in each of the five counties around the Tahoe Basin, each such lot is ranked against its counterparts. Based upon a statistical formula, TRPA then established an initial minimum score; those lots with scores above that minimum were eligible to be developed, subject to other conditions not at issue in this case, while those whose scores fell "below the line" were required to wait for eligibility. The initial minimum score established by this process was 725.

48. Kelly's Hilltop Lots were evaluated under IPES and received the following IPES Scores:

Lot 33 679
Lot 34 531
Lot 35 629
Lot 36 758
Lot 37 615
Lot 38 635

Since Lot 36 received a score above 725 it is immediately eligible.

49. Kelly appealed the remaining scores under Subsection 37.10.D of the Code of Ordinances and Rules of Procedure of the TRPA. Under this procedure the appealed lots were reevaluated under IPES by a new team and new scores were issued. The appealed scores are:

Lot 33 725
Lot 34 694
Lot 35 737
Lot 37 702
Lot 38 693

Therefore under the IPES criteria all but three of Kelly's lots are immediately eligible.

50. IPES includes a process whereby, in each county where certain conditions are met, which include such things as installation of erosion control measures, monitoring of water quality, and the like, the minimum IPES score to be eligible will be reduced each year. As the "line" moves, down, lots with lower scores will become eligible to build. Theoretically, over time, all the vacant lots in the Basin will become eligible to build, with those scoring the lowest being last in line.

51. IPES makes an exception to the above stated general rule for eligibility in that those lots which are part of what TRPA calls Stream Environment Zones, or SEZs, are permanently barred from development because of the extreme environmental hazard created by such development. None of Kelly's lots are within an SEZ.

52. Kelly argued at trial, and presented evidence contending, that IPES is not reasonably related to a reduction in the continuing decline of Lake Tahoe. While there currently are no studies comparing the full extent of natural nutrient loading at Lake Tahoe versus that loading due to cultural activities in the Basin, even small amounts of additional loading from unnatural sources can play a disproportionate role in upsetting Tahoe's natural equilibrium.

53. The nutrients included by Kelly's expert, Timothy Durbin, in his budgets, i.e., dissolved inorganic nitrogen and soluble reactive phosphorus, are not the only significant forms of nitrogen and phosphorus in evaluating the causes of algal growth and the eutrophication of Lake Tahoe. Although the complete processes of the cycling of nitrogen and phosphorus at Lake Tahoe have not been quantified because of the complexity of the ecosystem, particulate and organic forms of both nitrogen and phosphorus are an important, if not more important, source of nutrients to the more than 100 forms of Tahoe algae because of the recycling of nitrogen and phosphorus from one form to another and back again in the natural cycles of each.

54. The processes to be evaluated in depicting a complete nutrient budget for Lake Tahoe are far more complex than the simple, two-chemical evaluation utilized by Mr. Durbin to support his theses about the Lake. TRPA, in conjunction with the Tahoe Research Group and the Lake Tahoe Interagency Monitoring Program, have been engaged in an effort to describe a thorough nutrient budget for Tahoe for some years, but it will take much more work, time and funding before the results are complete enough to describe all the processes affecting algal growth in Lake Tahoe. However, it is unnecessary, for policy making purposes, to have a complete nutrient budget for Tahoe. Scientists studying the Lake have identified a variety of sources of causes of eutrophication of Lake Tahoe, including land disturbance; TRPA is well-justified in attempting to reduce or control those sources of causes as they are identified, without waiting until the total process can be more perfectly quantified, so long as it continues as well to conduct further base-line and research studies.

55. Mr. Durbin's budget analysis is further flawed in its approach, whereby he attempts to explain all the nutrient-contributing processes in Tahoe's entire ecosystem by a simple examination of an isolated part. Not only is it not valid to extrapolate conclusions about other, entirely different processes form such an analysis, Mr. Durbin's efforts ignored the extraordinary dynamism of the whole.

56. Since particulate and organic forms of nitrogen and phosphorus are derived almost entirely from land disturbance at Tahoe, Mr. Durbin's failure to consider these forms in his budgets results in those budgets being greatly oversimplified in their attempts to describe nutrient processes at Lake Tahoe as being derived primarily from atmospheric sources. For similar reasons, Mr. Durbin's budgets fatally understate the contribution of development to nutrient loading of total nitrogen and total phosphorus to Lake Tahoe.

57. As Lake Tahoe has received greater quantities of nitrogen from human influences on the Basin, other nutrients are beginning to play more significant roles in governing the growth and rate of growth of eutrophicating algae. At times, phosphorus is the limiting nutrient in such processes, and trace elements also seem to play critical parts in stimulating algal growth. Since these nutrients all derive almost entirely from land disturbance, as contrasted to atmospheric inputs, Mr. Durbin's failure to analyze fully these other nutrients is another flaw in the conclusions he draws form his attempted depiction of nutrient processes at Lake Tahoe.

58. While Mr. Durbin's theoretical budget work rested entirely on limited forms of nitrogen and phosphorus, by which he attempted to draw valid conclusions about the causes of Tahoe's eutrophication, actual bioassay studies of a variety of nutrients, performed under carefully controlled scientific conditions, reveal that such causes are much more complex than Mr. Durbin's analysis comprehends.

59. Such bioassay analyses demonstrates that the simple addition of nitrogen or phosphorus to Tahoe's lake water produces limited or no algal growth response. Similar results are obtained when the chemicals contained in atmospheric pollution are added to lake water. Such experiments come closest to mirroring the simple processes analyzed by Mr. Durbin's work. On the other hand, when Tahoe stream water, with all the complex chemicals, including nitrogen and phosphorus in all their forms, as well as the various trace elements, found therein, is added to Tahoe lake water, the algal growth rate is highly stimulated. These experiments tend to show that land disturbances in the Tahoe Basin, which particularly enriches the input of particulate and organic nitrogen and phosphorus as well as trace elements to the Lake via streams, is an important factor which TRPA must address in its attempt to halt and reverse Tahoe eutrophication.

60. Lake Tahoe, before modern human influence, was able to maintain its ultraoligotrophic state notwithstanding some natural nutrient loading from the atmosphere and from its watershed. The amount of that natural loading is unknown. Since the cause of Tahoe's increasing eutrophication stems from the increment of nutrient loading introduced by human behavior, Mr. Durbin's depiction of the relative amount of such loading, compared to total loading, misses the point, even if such depiction were reliable. Even if the increment from human behavior is quite small relative to the total, controlling that increment is the most reasonable and appropriate strategy for TRPA to undertake to restore the Lake to natural equilibrium.

61. Even giving Mr. Durbin's limited nutrient analysis unwarranted credibility, he still concedes that land disturbances from development in the Tahoe watershed contributes at least six percent of the total load of dissolved inorganic nitrogen to Lake Tahoe, and at least 3,000 tons of a total of 24,000 tons of sediment annually. While these amounts may be small relative to the total inputs hypothesized by Mr. Durbin, they are part of the human-induced increment which has brought Lake Tahoe out of ultraoligotrophic equilibrium, and thus are part of the loading which TRPA properly must endeavor to reduce or eliminate.

62. Plaintiff's experts produced no credible evidence that atmospheric pollution is transported from the urbanized coast and valley west of the Basin to Lake Tahoe. To the contrary, defendants' expert, Dr. Cahill, testified that the primary airsheds from which prevailing winds blew into Tahoe were in the Pacific and the northwestern continent — some of the cleanest airsheds in the world. The bulk of atmospheric deposition of nutrients on Lake Tahoe thus likely is produced within the Basin itself.

63. Studies of Tahoe's sediment core, conducted by the Tahoe Research Group, demonstrate a profound change in the diatom population of Lake Tahoe occurred around 1960, coincident with the onslaught of modern land development in

the Basin. This diatom change is demonstrative of Tahoe's trend towards eutrophication, which began at that time. The same sediment core studies show an increase in the rate of sedimentation input into Lake Tahoe, which increase could only have been caused by land disturbance, as opposed to an increase in atmospheric pollution.

64. The sediment core studies did not show that Tahoe suffered any lasting increase in either sedimentation rate or nutrient input rate as a result of logging practices in the Basin during the late nineteenth century. Such a result is best explained by the testimony of Dr. Margaret Davis, who described scientific studies of other lakes and watersheds which underwent similar perturbations and reacted much like Lake Tahoe has. In those other cases, the impact from logging in past centuries was relatively minor, as natural processes were able rapidly to recover from such disturbances. On the other hand, when permanent housing development took place in the same watersheds, the nutrient and sediment input to the affected lakes was much greater and quite persistent.

65. The use of best management practices (BMPs) to reduce erosion and runoff is valid strategy employed as part of TRPA's regulatory practice to reduce or eliminate input to Lake Tahoe from land usage. BMPs, however, are not a panacea. There are no guarantees that such practices will be maintained over the life of the particular development whose impacts are meant to be addressed by the BMPs, and TRPA's experience demonstrates that such long-term maintenance is an exception, rather than the rule. When not maintained, BMPS inevitably fail, and their value in controlling sediment and nutrient inputs to the Lake commensurately dwindles. Accordingly, it is not irrational of TRPA, in IPES, to deny special credit to land developers like plaintiff for its installation of BMPs on its property — particularly because TRPA, as a matter of course in its 1987 Regional Plan, requires every land developer to install at least a minimal level of such BMPs.

66. Over time, unless the accumulation of silt and sediment in the Uppaway infiltration trench system is periodically and effectively removed and disposed of outside the Basin, the drainage control system in that development will become ineffective in trapping such sediments. Eventually, the system will fail altogether from overload.

67. Nutrient uptake processes take place, for the most part, in the shallowest portion — no deeper than three or four inches — of the soil profile. The infiltration of water below this zone of uptake, as is accomplished by the infiltration system at Uppaway, impedes for a time the ability of plants to accomplish nutrient removal, ensuring a nutrient-enriched groundwater, but there is no indication that this nutrient groundwater reaches the Lake from the slopes of Uppaway.

68. Loss of vegetation through development causes the loss of the ability of the natural environment to remove nutrients from surface and near-surface waters, thus contributing to nutrient loading of streams and groundwater. The limitation in IPES on the creation of impervious surfaces via development is a valid strategy to limit the loss of such nutrient-stripping vegetation.

69. Cagwin soils make up most of the soils at Uppaway. When those soils are compacted, they are susceptible to a great deal of runoff and a high rate of erosion. These problems are dangerously exacerbated during major storm events such as when warm spring rain falls on a major snow pack.

70. The results derived from the rainfall simulation experiments of Douglas Guerrant, plaintiff's expert, were fatally affected by flaws in experimental design and methodology. Of the four devices utilized in the experiments, only one produced dat that even plaintiff could characterize as useful. However, in that experiment, Mr. Guerrant, by raking the soil in the test plots which were claimed to reproduce sites which emulated development, created plots which were calculated to produce the highest

rate of *infiltration* — a condition not extant on actual developed sites. As a consequence, Mr. Guerrant's results greatly overstated the ability of Uppaway's soils to withstand erosion and runoff upon development. Notwithstanding, Mr. Guerrant's results confirmed TRPA's view that slope and disturbance are major factors producing soil loss, and that Cagwin soil, when compacted is highly erodible.

71. The study by Mr. Mahannah of five Tahoe watersheds, even if its limited scope is given credit, did not show that construction does not contribute to nitrogen and phosphorus loading of streams; indeed, Mr. Mahanna's study revealed that, in many cases, loading of those nutrients was greater in the streamwater below development than above.

72. Phosphorus, nitrogen and some important trace elements in Lake Tahoe are in fact increasing beyond their historical levels.

73. Increased levels of nutrients are in fact causing increased algal growth.

74. Increased algal growth and sedimentation do in fact cause loss of water clarity.

75. Sediment and nutrient transport from so-called "hazardous" residential areas are in fact having a meaningful and pronounced effect on the contribution of phosphorus and nitrogen and trace elements to the Lake.

76. IPES, as evaluated in this case, is an evenly applied and non-discriminatory effort to control or reduce nutrient and sediment inputs to Lake Tahoe from residential development. TRPA's IPES program, because it attempts to predict the relative contributions of both organic and inorganic forms of nutrients, dissolved and particulate, is properly aimed at regulating the input of all these nutrients to the Lake from the development of single family homes in the watershed.

77. The Hilltop Lots, the subjects of this action, maintain current, substantial value under the regulations of the 1987 TRPA Regional Plan.

78. In addition to the above findings, the Court incorporates the findings set forth in the Court's Order Partially Granting and Partially Denying Motions for Summary Judgment signed on August 23, 1989.

Based on the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW:

1. The Plaintiff having conceded at the hearing on Defendants's Motions for Summary Judgment that he was not seeking monetary relief against individual members of TRPA's Governing Board, said defendants are entitled to judgment against Kelly on any claims for relief alleging damages against them.

2. Despite major changes since 1979, the TRPA is still an independent agency. The Plaintiff has produced legally insufficient evidence to establish that the Agency is the alter ego of either State Defendant; moveover, there is no evidence that Nevada or California officials acted in an actionably tortuous or condemnatory fashion. The dismissal of the State Defendants is therefore appropriate.

3. Plaintiff has no standing to collaterally attack a neighboring federal court ruling nor has Plaintiff established a basis for relief under a malicious prosecution theory against the State of California.

4. The action of the Federal District Court for the Eastern District of California cannot form the basis of a claimed taking and therefore Plaintiff is entitled to no relief for an alleged *First English* taking during the time the Federal court injunction prevented TRPA from allowing Plaintiff to develop his property.

5. Plaintiff, having proved no Constitutional violations, is entitled to no relief under 42 United States Code Section 1983.

6. Plaintiff has failed to demonstrate that TRPA has deprived him of procedural due process. Procedural due process rights do not include the right to force an agency to take action on permit application.

7. TRPA's ordinances 81-1 and 81-5 were written to apply to all property owners on the Nevada side of the Tahoe Basin. Those procedures were evenly and properly applied and therefore Plaintiff was not denied the equal protection of the laws.

8. TRPA's powers are derived from a federal Compact ratified by the Congress of the United States. The Compact itself is a congressional exercise of power under the Compact Clause and amounts to federal legislation. As federal law, the regional plan adopted by the TRPA preempts state law and state constitutional provisions. Accordingly, any claims asserted by the Plaintiff based upon Nevada's Constitutional provisions should be dismissed.

9. To date Plaintiff has received no building permits for construction on the parcels in question. Having not yet received building permits he has no vested rights as a matter of law.

10. Plaintiff has failed to prove that TRPA's conduct concerning the regulation of building on Plaintiff's property was the product of inaction or discrimination directed against Plaintiff. Given the context in which TRPA's activities must be placed, the court concludes that Plaintiff is not entitled to estoppel relief as claimed in the complaint.

11. Plaintiff has an adequate remedy at law for any temporary taking of his property and therefore is not entitled to estoppel relief.

12. There is no evidence of fraud or malice on the part of TRPA and therefore Plaintiff is not entitled to punitive or exemplary damages.

13. There is legitimate governmental interest in the protection of the Lake Tahoe Region by attempting to insure an equilibrium between its natural endowment and its

manmade environment. The Court has found that the IPES system examines runoff and erosion hazard characteristics of individual lots and anticipates the effect which development may have on sediment and nutrient transport. Even though the IPES point system, for the most part, discounts the mitigating effect which best management practices may have upon nutrient and sediment transport, it is, nonetheless rationally based because it evenly and scientifically rates runoff potential and erosion hazard which might ultimately flow from the parcels it measures. Therefore, the regulatory system predicated upon IPES is a valid exercise of the police power.

14. The 1987 TRPA Regional Plan and its implementing ordinances, including IPES, are facially constitutional.

15. TRPA's 1987 Regional Plan and ordinances, including IPES, substantially advance the legitimate governmental interest in the protection of the Lake Tahoe Region.

16. TRPA's 1987 Regional Plan and ordinances adopted thereunder, including IPES, do not deny Kelly the economically viable use of the lots which are the subject of this action.

17. Kelly has failed to present sufficient evidence that his parcels have been permanently taken by action of the TRPA since IPES contains a procedure which will allow the "cut off line" to move downward thereby making it likely that all of Kelly's lots will eventually become eligible for building permits. TRPA's 1987 Regional Plan and ordinances adopted thereunder, including IPES, do not, therefore, take Kelly's lots, the subjects of this action, without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

18. TRPA's Ordinances 81-1 and 81-5, and each of them, substantially advanced the legitimate governmental interest in the protection of Lake Tahoe and did not deny Kelly the economically viable use of his lots, the subjects of this action. TRPA's Ordinances 81-1 and 81-5, and each of them, do not violate Kelly's right to substantive due process of law

under the Fifth and Fourteenth Amendments to the United States Constitution. TRPA's Ordinances 81-1 and 81-5, and each of them, did not, permanently or temporarily take Kelly's lots, the subject of this action, without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

18. Kelly is entitled to no damages for an alleged temporary taking during the period between August 26, 1983 and April 26, 1984, known as the "moratorium", since TRPA's suspension of review of building permit applications was done in good faith for a significant public purpose and was reasonable in duration given the complexity of the tasks undertaken.

19. Kelly is entitled to no damages for an alleged temporary taking between April 26, 1984 and May 27, 1987, the effective date of the 1987 Regional Plan, since the inability of TRPA to authorize construction during this period was the result of a Federal District court order over which TRPA had no control.

20. Kelly is entitled to no damages for an alleged temporary taking after May 27, 1987 since Ipes [*sic*] is a rationally based system calculated to help prevent degradation of Lake Tahoe and thus benefits Kelly directly. Further, TRPA's 1987 Plan, including IPES, does not violate Kelly's right to substantial due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

21. As long as the benefit received by the property from the ordinances is direct and substantial and the burden imposed is proportional, the TRPA can force landowners like Mr. Kelly to postpone their building plans for a reasonable period of time.

22. Neither the 1987 Regional Plan for the Lake Tahoe Basin nor the Code of Ordinances, nor any predecessor plan or ordinance, have deprived Mr. Kelly of his interest in property in a manner requiring compensation under the Fifth and Fourteenth Amendments to the United States Constitution.

23. Neither the 1987 Regional Plan nor the Code of Ordinances, nor any predecessor plan or ordinance, has deprived Kelly of this right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

24. Plaintiff is entitled to no injunctive relief.

Based upon the above stated Findings of Fact and Conclusions of Law the Court enters its

JUDGMENT:

Judgment is entered as follows:

1. Based upon the findings and conclusions set forth herein, as well as the findings and conclusions set forth in the court's order of August 23, 1989 partially granting and partially denying motions for summary judgment, the States of Nevada and California are dismissed from this suit as parties defendant.

2. Judgment is entered in favor of TRPA and against the Plaintiff as to the following causes of action and claims for relief:

A. All malicious prosecution and conspiracy claims.

B. All claimed denials of civil rights.

C. All due process claims under the United States Constitution.

D. All takings claims under the United States Constitution.

E. All equal protection claims under the United States Constitution.

F. All claims under the Constitution of the State of Nevada.

G. All claims of vested rights.

H. All estoppel claims.

I. All claims for injunctive relief.

J. All claims for punitive and exemplary damages.

K. Any and all additional claims contained within the complaint as more fully set forth in the Court's Order Partially Granting and Partially Denying Motions for Summary Judgment signed on August 23, 1989 and the Court's Decision filed on July 13, 1990.

3. Defendant TRPA is awarded its costs in the amount of $241,836.69 and its attorneys fees in the amount of $7,500.00, (please see Court Order dated February 20, 1991 and the Explanatory Order filed of even date herewith).

FINDINGS AND CONCLUSIONS FOR PART III OF COURT'S DECISION:

1. Uppaway Estates is a planned unit development of 44.45 acres located at Glenbrook, Lake Tahoe, Nevada. Plaintiff Kelly purchased this property in 1966 which was and still is zoned one acre residential by Douglas County Ordinance.

2. In 1972 the estate contained three residences consisting of the main house, a guest house and a caretaker's house. From early on, Mr. Kelly intended to develop the property because he thought 44.45 acres was too large for one residence, and he thought he could recover his investment.

3. In 1972 the Tahoe Regional Planning Agency (TRPA) adopted a Land Use Ordinance for the entire Lake Tahoe Basin imposing population density controls and land coverage limitations. This ordinance limited development on the Kelly property but allowed for variances if it could be demonstrated that the project would not cause detrimental environmental consequences.

Accordingly, Mr. Kelly sought to design a development in such a way to demonstrate that it would cause no environmental harm to Lake Tahoe, even though the land coverage

limitations imposed by the TRPA Land Use Ordinance would be exceeded. In doing so he needed a variance.

Section 8.25 of the TRPA Land Use Ordinance provided:

Additional Land Coverage — Administrative Permit

> "Land coverages in excess of those permitted in any Land Capability District may be authorized by administrative permit issued by the permit-issuing authority upon a showing in a Land Capability Report by the applicant, in accordance with the applicable provisions of the Rules and Regulations of Practice and Procedure, that:
> * * * * *
>
> (2) the applicant's proposed development, as designed and located, will not cause the detrimental environmental consequences on the land of the applicant, or on other lands or waters, that were the basis of the classification of the applicant's land in the applicable Land Capability District in the first instance."

4. The tentative map of Uppaway Estates which depicted each building envelope as to site and size, was presented to and, after public hearings, approved by the Douglas County Planning Commission and the Douglas County Board of County Commissioners in 1974. The project consisted of 39 residences on the 44.45 acres not to exceed 2,500 square feet of impervious cover for each building envelope with the one exception of the main residence built in 1938.

5. The permit issuing authority for variances in this case was the Douglas County Board of County Commissioners. The Douglas County Planning approved the project on August 27, 1974. On September 20, 1974, the Douglas County Commissioners approved the tentative map and issued an administrative permit to allow land coverage in excess of those permitted by the TRPA Land Capability Districts on the subject property, pursuant to Sec. 8.25 of the TRPA Land Use Ordinance.

> "[T]he applicant's proposed development, as designed and located will not cause the detrimental environmental consequences on the land of the applicant or on other lands or waters, that were the basis of the applicable Land Capability District in the first instance."

6. The tentative map and administrative permit were then taken to the TRPA for review which held three separate hearings before its Governing Board. Kelly presented evidence and testimony of six (6) expert witnesses on soil, geology, surface drainage, and the inherent design relationship, water and fire hazard.

7. The TRPA Governing Board vote on the development resulted in a lack of a dual majority, which, under the language of the TRPA compact at that time resulted in approval. However, TRPA wished to test this procedure and filed suit against Plaintiff, Kelly and Douglas County attempting to annul the Douglas County Administrative permit and the "deemed-approved" mechanism. The United States District court held:

> (1) the project is approved under the compact because of lack of dual majority vote.
>
> (2) that the Douglas County variance was legally granted, permitting the excess ground coverage for Uppaway.

The TRPA Governing Board concluded that further legal action on behalf of the staff was unwarranted and the District Court decision became final.

As a result of the Federal Court litigation this Court finds that the issues presented to the Federal Court have been fairly tried by a competent tribunal and the doctrine of res judicata is applicable to these issues. However, events occurring since approval have caused the parties to become more and more uncertain about the exact application of the Federal Court ruling to the hilltop. Examples include some intervening changes sought to the subdivision itself and the

evolution of a new Plan and several new Ordinances not within the contemplation of the Federal Court.

8. To give these issues an historical setting, Mr. Kelly planned to improve and sell off units in the development in orderly phases, with the lakeshore lots to go on line first, the tennis court lots to follow, and finally the hilltop that is the subject of this litigation. No unreasonable delays on Kelly's part interrupted this orderly procession.

9. In 1981 it was determined that a road to the hilltop would be more suitable than a funicular and plans were drafted for this purpose using no more coverage than that authorized for the funicular. Among other reasons, the fire chief and sheriff sought a road for purposes of fire protection and law enforcement. On April 30, 1981, Mr. Barrett wrote a letter to Douglas County reciting in pertinent part:

> "TRPA staff considers this modification of access and land coverage to be a significant modification to the TRPA approval and, therefore, subject to Governing Board approval."

10. Robert Lahmann moved to Uppaway in 1976 to serve as on-site manager for Mr. Kelly. He continued in this position until 1982 (Tr. 333). Gordon Barrett, Senior Planner for the TRPA, was delegated the overall supervision of the Uppaway project by TRPA Executive Secretary Overynder.

11. In the summer of 1981 Mr. Lahmann prepared a draft proposal to "settle all the issues" between the TRPA and Uppaway. This overture proposed to eliminate two hilltop lots to overcome Mr. Barrett's objection to the hilltop lots. Lahmann had advised Barrett that Uppaway had not been over covered and would provide a survey.

12. In the fall of 1981 an application was made to the TRPA for a building permit for lot 34. See Plaintiff's Exhibit 1-2 for location. The TRPA staff responded with a letter dated October 29, 1981, reciting:

"On August 25, 1981, Ordinance 81-5 went into effect***"

"In processing your individual application, it has been found that your lot is a critical land capability area and is located within a subdivision which has been classified as of in need of further consideration. Therefore, your application will not be eligible for review until (1) drainage and erosion control improvements are made to the subdivision, as per plans approved by the Agency and the subdivision is then reclassified as either "adequate" or "potentially adequate"; or (2) adoption by the Agency of amendments to the Regional Plan pursuant to Article V(c) of the Compact."

13. At this point in 1981 TRPA staff discounted the prior approvals for Uppaway by the Douglas County Planning Commission, Douglas County Commission, the TRPA and the United States District Court. Ordinances 81-1 and 81-5 and the 1987 Regional Plan gave the TRPA staff (which has never liked the coverage aspects of Uppaway) successive, arguable reasons for reasserting jurisdiction.

81-1 proscribes:

"[T]hose activities *NOT* having a substantial effect on the land, water, air, space or other natural resources of the Tahoe Region and are *NOT PROJECTS* under the Tahoe Regional Planning Compact, as amended and not subject to review and approval of the agency confirming that such activities will not have a significant effect on the environment and thus exempt from the requirement of preparation of an environmental impact statement." (Emphasis added.)

81-1 Section 2:

"Critical area. An area within the Region that is of such sensitivity that any activity may substantially affect the land, water, air space or any other natural resource in the region. (1) Critical land capability areas, including high hazard lands (land capability districts 1a, 1b, 1c and 2)."

Section 3.10

"Residential activities

"The residential activities set forth in Sections 3.11, 3.12 and 3.13 are *not "projects"* within the meaning of the Compact * * * and are exempt from the Agency's review and approval.

3.12 New Residential Construction

"The following activities are exempt if they are located in a subdivision approved by the Agency after February 10, 1972, which subdivision was approved without reliance upon sections * * * 8.25(2) * * * of the Agency Land Use Ordinance."

Uppaway was approved pursuant to a variance granted under section 8.25(2), but the TRPA was taking the position that Ordinance 81-1 classifies the Uppaway hilltop lot as a new "project".

14. Ordinance 81-5 purports to prohibit development in land classified as high hazard.

Section 12.60

"Except as otherwise provided by this Ordinance, and subject to the exceptions set forth in this subsection, no person shall perform any grading, clearing, removal of vegetation, filing or creation of land coverage upon land within land capability districts 1a, 1c, 2 and 3. Said prohibition and provisions of subsections 12.10, 12.20, 12.30 and 12.40 do not apply to:

"12.61 Approved Subdivisions

Land within subdivisions approved by the agency's land capability district regulations, without reliance upon or reference to sections * * * 8.25(2) * * *."

15. Sections 12.10, 11 and 12 create classifications for "adequate", "potentially adequate" or in need of further study. The TRPA letter of October 29, 1981, Plaintiffs Exhibit 1-7, relating to hilltop lot 34 recites in part:

> "It has been found that your lot is in a critical land capability area and is located within a subdivision which has been classified in need of further consideration."

The TRPA advised Plaintiff that even though these lots had been granted a prior variance upon a Douglas County finding approved by the TRPA and reaffirmed by a federal court that this "development will not cause detrimental environmental consequences on the land of the applicant or other lands or water of the Tahoe Basin," that the Uppaway hilltop lots were nonetheless subject to Section 12.11(c):

> (c) "In need of further consideration" - poor placement of roads and drainage structures in relationship to natural features; unstable cuts and fills, which are incapable of satisfactory rehabilitation; unstable internal and downstream drainages and waterways; land coverage generally exceeds that permitted by the Agency's Land Use Ordinance; and the lack in individual cases of substantial construction of roads, utilities or drainage structures."

16. Plaintiff's choice in 1981 and 1982 was either to disregard TRPA's efforts to reimpose its jurisdiction and face threats of fines of $5,000.00 per day, or to seek a compromise. He chose the latter course, which was reasonable under the circumstances.

17. In September of 1981 Mr. Kelly met with Engineer Ernie Jones to request an update of the engineering drawings for the development of the seven hilltop lots. Plans were prepared and submitted to the TRPA in December citing all lots below 30% slope to comply with the Bailey system which had been adopted by the TRPA. Plaintiff's Exhibit 1-9. Mr. Barrett responded with Plaintiff's exhibit 10 stating that Mr. Kelly "must submit an application to the Agency to modify the final map and improvement plans of Uppaway."

18. On January 21, 1982, TRPA staff wrote another letter stating that Ordinance 81-5 was applicable to the hilltop and within an area "classified in need of further study." In May of 1982 Mr. Kelly's attorney telephoned TRPA's attorney to advise that Mr. Kelly was going to proceed with the construction of the Hilltop pursuant to prior approvals and court order and that 81-1 and 81-5 are not applicable to Uppaway. TRPA counsel wrote the following letter:

> "Thank you for your telephone call yesterday indicating Uppaway Estates intends to solicit bids for construction of a road on the hilltop portion of the subdivision. The purpose of this letter is to formalize a means through which we might at least clarify the issues involved in the proposed construction of the subdivision road. * * * *"
>
> "TRPA maintains the amendment of the Uppaway Subdivision map to approve the road in lieu of the funicular was a substantial modification of the subdivision, requiring further approval by the TRPA Governing Body." Plaintiff's Exhibit 1-14.

19. The TRPA position was refuted by Mr. Kelly's counsel who continued to refuse to recognize the application of 81-1 and 81-5 to the hilltop lots and refused to take the approved hilltop development back to the Governing Board of the TRPA.

On May 19, 1982, TRPA counsel responded as follows:

> "Pursuant to our meeting today, I am writing to confirm our understanding and agreement as follows:
>
> 1. Your clients shall submit, or cause to be submitted, to Gordon Barrett of TRPA staff a copy of all construction drawings and other pertinent information with respect to the proposed construction of improvements relating to Lots 33 through 39 of Uppaway Estates, including the proposed road, TRPA agreeing that by submitting such information, or by causing it to be submitted, your clients do not waive or otherwise detract from any legal right or contention possessed or maintained by them; and
>
> 2. Your clients shall not commence construction of said improvements until TRPA staff has had an opportunity to determine whether the proposed construction is substantially in accordance with the subdivision plans deemed approved by TRPA pursuant to the Tahoe Regional Planning Compact."

20. The TRPA letter was followed by a Kelly letter reiterating his contention that the change from a funicular to a road was not a substantial change and that the issues would not go to the Governing Board, that they would instead be settled with staff and the Chairman of the Governing Board, Bennie Ferrari. Plaintiff's Exhibit 1-16. TRPA counsel responded that Gordon Barrett is "doing his utmost to achieve an expeditious determination regarding substantial conformance." Chairman Ferrari was to make the final determination.

21. A meeting was then held on June 4, 1982, between TRPA Chairman Ferrari, Gordon Barrett and attorney Gary Owen, acting on behalf of the TRPA, and Paul Hogan and Bill Aird from the Law Offices of Daniel R. Walsh, representing Mr. Kelly. The primary issue was the development

of the hilltop lots including (1) the construction of the access road to the hilltop instead of the funicular, (2) the construction of the hilltop road including all offsite improvements for the lots and (3) construction of the lots. In consideration of the elimination of lot 39, and the relocation of other building envelopes to sites less steep than before, TRPA evidenced a willingness to allow construction to proceed without further action by the Board.

22. Gordon Barrett approved the improvement plans for lots 33-38 on July 22, 1982, in writing and with the TRPA seal. Plaintiff's Exhibits 41, 43, 44, 46, 1-21, 1-21A. Pursuant to a request on behalf of Kelly, Mr. Barrett also noted on the plans that the TRPA approvals were pursuant to the July 22, 1982 understanding. Plaintiff's Exhibit 1-24.

23. Mr. Barrett testified that the major concern of Kelly "was the legal status of these approvals and they seemed fairly adamant that they were not going to go to the Board for any kind of approval." Tr. 237. The only way Kelly could avoid going to the Board was to be found in substantial compliance with the previous approvals through the Court Order. Tr. 237 Mr. Barrett found the plans to be in substantial conformance, obviating compliance with 81-1 and 81-5. Tr. 218, 219.

This Court also finds the construction work completed by Mr. Kelly on the hilltop to be in substantial conformance with the subdivision plans deemed approved by the TRPA and the federal court and concludes that the changes made were, in a jurisdictional sense, minor changes.

24. Applications for TRPA approval of building permits for the hilltop lots on the consent calendar were filed with the TRPA on July 28, 1982, six days after the agreement. A fee of $220.00 was paid for each lot for a total of $1,320.00, which has never been returned to Mr. Kelly.

25. Construction of the access road instead of funicular, and hilltop road with offsite improvements for the six lots, plus infiltration trenches, commenced immediately. Except

for some minor items, the road and all offsite improvements were completed by October 1982. (Tr. 388-392, 397).

> "In addition to the environmental protection measures taken on the rest of the subdivision the hilltop measures included a connection from the roadside infiltration facilities up to each one of the individual building sites so that any drainage that was collected on the roof structures or on site of each one of the lots would be provided with a connection into the infiltration system so that any of the water that was created on the individual parcels would be integrated as a part of a master storm drainage system. The plan was submitted to and approved by the TRPA." Tr. 273
> *See* also Tr. 270, 271, 275, 278 and 283 for further description of the hilltop improvements. Plaintiff's Exhibits 1-42 depicts the actual construction conditions and 1-23 depicts the offsite improvements after construction."

26. Approved as being in substantial conformance with prior approvals and court order were (1) the change from funicular to road and the construction of this access road; (2) the construction of the hilltop road and all offsite improvements for the six lots and (3) the six lots.

27. Mr. Kelly was finally able to apply for building permits on a section of the subdivision which the TRPA conceded as adequate under existing rules and procedures.

28. Building plans were submitted to Douglas County for the purpose of obtaining building permits from the county on November 22, 1982. Plaintiff's Exhibits 1-27. Building permits were issued by Douglas County on December 30, 1982, for the six hilltop lots. Plaintiff's Exhibit 1-28. Mr. Kelly paid $1,600.00 for each building permit. On August 11, 1986, the Douglas County District Attorney issued an opinion reciting in part as follows:

> "It is my understanding that the permits were issued originally with 6 conditions. Following the

> approval Uppaway paid the required fees and proceeded to complete the conditions outlined by the Board of Commissioners. One of these conditions states that "construction shall not commence until all conditions are completed." One of the conditions which had to be completed concerned approval by the Tahoe Regional Planning Agency or a court of competent jurisdiction. Since TRPA has not acted on these permits it would seem that the process contemplated by the approval is still ongoing, therefore, the permits are still active so long as the approval of TRPA is being sought by Uppaway and the agency has not taken final action or the court has not decided the matter." Plaintiff's Exhibit 1-49.

29. The TRPA did not act on Plaintiff's applications from August, 1983, to April, 1984, on the basis of TRPA inaction on the files; (nonetheless, there is no evidence of intentional neglect or malice pertaining to this inaction over the winter months of 1983/84. See next two numbered paragraphs.) The California Attorney General's office, then obtained a preliminary injunction from the Federal Court in Sacramento that prohibited the TRPA from acting on applications for all building permits in the Tahoe basin.

30. During the period from 1982 through 1987, when Mr. Kelly's case-by-case applications under Ordinance No. 81-5 were filed with and pending approval by TRPA, TRPA was faced with the difficult and time-consuming task of implementing the novel and complex planning approach of the 1980 Compact, including its pressing deadlines for the adoption of environmental threshold carrying capacities and a new plan and ordinances attaining and maintaining them as well as meeting state and federal air and water quality standards. Added to this task was resolving the dilemma of what to do about the 17,000, more or less, preexisting single-family lots, of which Mr. Kelly's holdings were a portion. Ordinance 81-5, adopted June 1981 and effective

August 1981, was an interim measure at least partially to deal with the issue of the numerous lots in the State of Nevada, and particularly those in high-hazard classifications such as Mr. Kelly's. The ordinance resulted in many case-by-case applications, the processing of which, commencing in August 1981, was occurring simultaneously with TRPA'S compliance with the regional planning mandates of the 1980 Compact.

31. In addition, in early 1983, pursuant to a TRPA staff indication that winter snow conditions precluded on-site assessment of the proposed case-by-case lots, Mr. Kelly, through his counsel, advised TRPA that Mr. Kelly would not be prejudiced by the winter delay. During the spring and summer of 1983 TRPA was processing numerous case-by-case applications, but because of the Compact deadline for adopting a new regional plan, it determined in August 1983 that it no longer legally could issue case-by-case permits, including those pursuant to Mr. Kelly's applications. In its regional plan adopted in April 1984, however, TRPA specifically provided for the continued processing and approval of case-by-case applications such as Mr. Kelly's. That procedure was not allowed to commence because TRPA's 1984 Plan was immediately enjoined from taking effect, through an injunction which prohibited TRPA from approving development projects, including single-family residences, until adoption of TRPA's 1987 Regional Plan.

32. The TRPA 1987 Regional Plan and IPES were finally adopted by the TRPA on July 1, 1987, which sought to deny the development of the Plaintiff's hilltop lots on the basis of the content of the new Plan and Ordinances. This lawsuit followed. Despite the delays, the Court finds actions of the TRPA to be reasonable and justified under all of the circumstances.

33. Kelly agreed to and did forfeit hilltop Lot 39 in exchange for the TRPA promptly processing his applications for TRPA approval of six building permits for Lots 33, 34, 45, 36, 37, and 38. The TRPA did not process these

applications and consequently they were never approved. Plaintiff Kelly should be returned to the same position he was in before he agreed to forfeit Lot 39. There was a failure of consideration of the condition upon which he gave up Lot 39 in the first place. Mr. Kelly can file an amended map with Douglas County to reinstate Lot 39. Reinstated Lot 39 will be considered in the same legal position as Lots 33, 34, 35, 36, 37 and 38.

34. Considering all Douglas County and TRPA prior approvals and the federal court order, Mr. Kelly does not have to obtain an allocation under Chapter 33 of the TRPA ordinances for these seven lots. The TRPA cannot force Mr. Kelly or the purchasers or assigns of these lots to stand in line with everybody else in light of the history of this development. The Douglas County building permits issued for these seven (7) lots are above and beyond the TRPA allocation to Douglas County. The exemptions for these lots run with the land and can be transferred to purchasers or assigns from Mr. Kelly.

35. Mr. Kelly, his purchasers or assigns will have to pay the air quality fee of $1,000 and the $2,500 refundable security deposit to assure proper completion of the residence in compliance with Douglas County ordinances and permit conditions. However, these lots are exempt from the water quality mitigation fees imposed by TRPA ordinance for each square foot of new coverage. Mr. Kelly has already spent considerable funds on mitigation. The fees Mr. Kelly paid to the TRPA in 1982 as described in finding 24 above may be credited against the fees that may be due the TRPA under this finding.

36. As a specially-engineered "planned unit development", Uppaway is far more than a traditional subdivision. What was "deemed approved" as Uppaway Estates under Article VI(k) of the 1969 Compact was a tentative subdivision map for 39 vacant, 2,500 square foot lots and a permit for "excess coverage" under Section 8.25 of the Land Use Ordinance.

When Uppaway became legally approved, the subdivision map was not just a device which created new and smaller parcels from a larger parcel. The "approved" permit stated exactly how many rooftops, roadways and driveways would interfere with the natural state of the topography and the nitrogen and phosphorus absorbing features of the soil and vegetation. The specific placement of each building envelope was set forth along with the exact amount of coverage to be contained therein. A height limitation was included. The utilities to each lot were delineated.

37. Section H of the Ray Smith report (Exhibit 39) contains the "heartwood" of Mr. Kelly's 1974 application and allows for 4.88 acres of coverage (212,900 square feet). This Court finds that the land coverage contained in the Ray Smith report represents an already adjudicated issue favoring Mr. Kelly, and the "deemed approved" stamp covers the whole development, and in that sense, makes Uppaway different from any other subdivision in the Tahoe Basin.

38. The development was engineered with an elaborate infiltration system to control drainage and erosion. All hard road surfaces tilt inward toward specially designed infiltration trenches working together with slope stabilization measures on both sides of the roadways. The infiltration system itself was purposefully over designed to protect against fifty year storm events, although the TRPA regulations at the time (and still) only required twenty year, one hour storm event mitigation measures.

39. Never, during the period of time the system was designed and installed, did the Plaintiff evidence any callous disregard for the nutrient transport sensitivities of his project. The design which he commissioned for the so-called "offsite" improvements (every place but building pads) was in every respect above-standard: the contractors did a workmanlike job of installing the tilted roadways, the infiltration trenches, the junction boxes and other facets of the system; appropriate warning signs telling people to stay

off the rocks are strategically placed on roadways; the asphalt appears evenly sloped and well-maintained.

There is absolutely no evidence that the infiltration system has ever failed, at least in the upper reaches of the subdivision where the hilltop lots are located, even though it has been in place now for several years. The hilltop lots are located in places which are as flat as feasible. The lots themselves are quite a distance from the shores of the lake and migrating water, even subsurface flows, would have to pass through a portion of the redundant system, as well as though several hundred feet of fairly heavily vegetated open space before reaching the lake. As long as the infiltration trenches are cleaned and maintained, the evidence shows that the likelihood that the hilltop lots would generate nutrient transport that would reach the lake is practically non-existent. It would be reasonable for the TRPA to require owners of property with systems like Uppaway to post a performance bond to assure regular clean up and maintenance of these systems.

40. To the extent that land coverage issues under IPES are in conflict with the land coverage issue adjudicated by the federal court decision, IPES must give way to the federal court decision. The IPES system, which is built upon a modified Bailey system, does not reflect such remarkably new insights into the Tahoe ecology as to vitiate the basis for the earlier approvals, given this Court's finding of lack of detrimental impacts, and the special *de jure* status of this subdivision under the Federal Court ruling.

Nevada has a strong legal tradition sanctioning planners from changing their minds about permissible uses after existing zoning and land uses ordinances have encouraged a developer to invest substantial sums in reliance on prior representations. Mr. Kelly has spent substantial sums in reliance upon his approvals, and the doctrine is properly applied to this case.

41. Since this Court has found that the prior federal court ruling is dispositive on the subject of how much gross land

coverage is available to Mr. Kelly, there is no legal impediment to Mr. Kelly preventing him from proceeding immediately to build or sell his seven (7) hilltop lots in a manner consistent with these findings.

CONCLUSIONS OF LAW

1. The issues relating to the Plaintiff's hilltop lots 33, 34, 35, 37, 38 and 39 have been fairly tried in 1975 by the United States District Court for Nevada, and the doctrine of res judicata is applicable to the following issues:

(A) The excess land coverage for Uppaway Estates was approved by a variance legally granted under Section 8.25(2) of the TRPA land use ordinance.

(B) Uppaway was approved under the TRPA Compact because of lack of dual majority vote.

(C) Considering all Douglas County and TRPA prior approvals and the federal court order, Mr. Kelly does not have to obtain an allocation under Chapter 33 of the TRPA ordinances for these seven lots. The TRPA cannot force Mr. Kelly or the purchasers or assigns of these lots to stand in line with everybody else in light of the history of this development. The Douglas County building permits issued for these seven lots are above and beyond the TRPA allocation to Douglas County. The exemptions for these lots run with the land and can be transferred to purchasers or assigns from Mr. Kelly.

(D) Mr. Kelly, his purchasers or assigns, will have to pay the air quality fee of $1,000 and he $2,500 refundable security deposit to assure proper completion of the residence in compliance with Douglas County ordinances and permit conditions. Mr. Kelly has already spend considerable funds on mitigation. The fees Mr. Kelly paid to the TRPA

in 1982 as described in finding 24 above may be credited against the fees that may be due the TRPA under this finding.

(E) Since this Court has found that the prior federal court ruling is dispositive on the subject of how much gross land coverage is available to Mr. Kelly, there is no legal impediment to Mr. Kelly preventing him from proceeding immediately to build or sell his seven (7) hilltop lots in a manner consistent with these findings.

2. Kelly is not guilty of laches.

3. On July 22, 1982, an understanding was reached between Plaintiff Kelly and the TRPA whereby access to the hilltop would be by road rather than funicular; that Kelly could proceed with construction of the hilltop road and all offsite improvements for hilltop lots 33, 34, 35, 36, 37, 38.

4. The understanding of July 22, 1982, between Plaintiff Kelly and the TRPA could not be implemented because of a moratorium placed on the TRPA by a California Federal Court Order. There was a failure of consideration of the condition upon which Mr. Kelly gave up Lot 39. Mr. Kelly can file an amended map with Douglas County to reinstate Lot 39 and the TRPA shall take no action to interfere with Kelly's right to obtain a Douglas County building permit for Lot 39 or build thereon.

5. The actions of the TRPA during the period from 1982 to 1987 are not confiscatory and do not require compensation.

6. Mr. Kelly's Douglas County building permits for six hilltop lots are still valid from the standpoint of the parties to this litigation but, of course, remain subject to the jurisdiction of Douglas County, and any of its ordinances, special conditions, or regulations.

7. Building envelopes will not exceed 2,500 square feet per parcel together with a small (380 square foot) allowance

for impervious coverage for driveways (see Explanatory Order of even date herewith).

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff William Cody Kelly may forthwith proceed to obtain building permits from Douglas County for hilltop lots 33, 34, 35, 36, 37, 38 and 39, and he, his purchasers or assigns, may construct residences on these lots in a manner consistent with the above Findings of Fact and Conclusions of Law.

DATED this 1st day of November, 1991.

/s/ Charles M. McGee
DISTRICT JUDGE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CROWELL, SUSICH, OWEN & TACKES, LTD., and that on the 6th day of November, 1991, I deposited for mailing at Carson City, Nevada, postage prepaid, a true and correct copy of Notice of Entry of Judgment, addressed to:

Richard M. Skinner
Deputy Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244-2550

Brian Chally
Deputy Attorney General
State of Nevada
123 West Nye Lane
Carson City, NV 89710

Jeffrey Blanck, Agency Counsel
Tahoe Regional Planning Agency
P. O. Box 1038
Zephyr Cove, NV 89448-1038

I also certify that a copy of the Notice of Entry of Order was personally served by hand delivery on November 6, 1991, during regular business hours, to the Law Offices of Daniel R. Walsh, located at:

Daniel R. Walsh, Esq.
Capital Plaza
1100 East William, Suite 217
Carson City, NV 89701

/s/ Lauren Arends
LAUREN ARENDS

PUBLIC LAW 96-551 - DEC. 19, 1980

Public Law 96-551
96th Congress

An Act

To grant the consent of the Congress to the Tahoe Regional Planning Compact, and to authorize the Secretary of Agriculture and others to cooperate with the planning agency thereby created.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, the consent of the Congress is hereby given to the Tahoe Regional Planning Compact heretofore adopted by the States of California and Nevada, which compact reads a follows:

TAHOE REGIONAL PLANNING COMPACT
ARTICLE I. FINDINGS AND DECLARATIONS OF POLICY

(a) It is found and declared that:

(1) The waters of Lake Tahoe and other resources of the region are threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity of the region.

(2) The public and private interests and investments in the region are substantial.

(3) The region exhibits unique environmental and ecological values which are irreplaceable.

(4) By virtue of the special conditions and circumstances of the region's natural ecology, developmental pattern, population distribution and human needs, the region

is experiencing problems of resource use and deficiencies of environmental control.

(5) Increasing urbanization is threatening the ecological values of the region and threatening the public opportunities for use of the public lands.

(6) Maintenance of the social and economic health of the region depends on maintaining the significant scenic, recreational, educational, scientific, natural and public health values provided by the Lake Tahoe Basin.

(7) There is a public interest in protecting, preserving and enhancing these values for the residents of the region and for visitors to the region.

(8) Responsibilities for providing recreational and scientific opportunities, preserving scenic and natural areas, and safeguarding the public who live, work and play in or visit the region are divided among local governments, regional agencies, the States of California and Nevada, and the federal government.

(9) In recognition of the public investment and multistate and national significance of the recreational values, the federal government has an interest in the acquisition of recreational property and the management of resources in the region to preserve environmental and recreational values, and the federal government should assist the states in fulfilling their responsibilities.

(10) In order to preserve the scenic beauty and outdoor recreational opportunities of the region, there is a need to insure an equilibrium between the region's natural endowment and its manmade environment.

(b) In order to enhance the efficiency and governmental effectiveness of the region, it is imperative that there be established a Tahoe Regional Planning Agency with the powers conferred by this compact including the power to establish environmental threshold carrying capacities and to adopt and enforce a regional plan and implementing ordinances which will achieve and maintain such capacities

while providing opportunities for orderly growth and development consistent with such capacities.

(c) The Tahoe Regional Planning Agency shall interpret and administer its plans, ordinances, rules and regulations in accordance with the provisions of this compact.

ARTICLE II. DEFINITIONS

As used in this compact, the following terms have the following meanings:

(a) "Region," includes Lake Tahoe, the adjacent parts of Douglas and Washoe Counties and Carson City, which for the purposes of this compact shall be deemed a county lying within the Tahoe Basin in the State of Nevada, and the adjacent parts of the Counties of Placer and El Dorado lying within the Tahoe Basin in the State of California, and that additional and adjacent part of the County of Placer outside of the Tahoe Basin in the State of California which lies southward and eastward of a line starting at the intersection of the basin crestline and the north boundary of Section 1, thence west to the northwest corner of Section 3, thence south to the intersection of the basin crestline and the west boundary of Section 10; all sections referring to Township 15 north, Range 16 east, M.D.B. & M. The region defined and described herein shall be as precisely delineated on official maps of the agency.

(b) "Agency" means the Tahoe Regional Planning Agency.

(c) "Governing body"means the governing board of the Tahoe Regional Planning Agency.

(d) "Regional plan" means the long-term general plan for the development of the region.

(e) "Planning commission" means the advisory planning commission appointed pursuant to subdivision (h) of Article III.

(f) "Gaming" means to deal, operate, carry on, conduct, maintain or expose for play any banking or percentage game played with cards, dice or any mechanical device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, stud poker, draw poker or slot machine, but does not include social games played solely for drinks, or cigars or cigarettes served individually, games played in private homes or residences for prizes or games operated by charitable or educational organizations, to the extent excluded by applicable State law.

(g) "Restricted gaming license" means a license to operate not more than 15 slot machines on which a quarterly fee is charged pursuant to NRS 463.373 and no other games.

(h) "Project" means an activity undertaken by any person, including any pubic agency, if the activity may substantially affect the land, water, air, space or any other natural resources of the region.

(i) "Environmental threshold carrying capacity" means an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain pubic health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise.

(j) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.

(k) "Areas open to pubic use" means all of the areas within a structure housing gaming under a nonrestricted license except areas devoted to the private use of guests.

(l) "Areas devoted to private use of guests" means hotel rooms and hallways to serve hotel room areas, and any

parking areas. A hallway serves hotel room areas if more than 50 percent of the areas of each side of the hallway are hotel rooms.

(m) "Nonrestricted license" means a gaming license which is not a restricted gaming license.

ARTICLE III. ORGANIZATION

(a) There is created the Tahoe Regional Planning Agency as a separate legal entity.

The governing body of the agency shall be constituted as follows:

(1) California delegation:

(A) One member appointed by each of the County Boards of Supervisors of the Counties of El Dorado and Placer and one member appointed by the City Council of the City of South Lake Tahoe. Any such member may be a member of the county board of supervisors or city council, respectively, and shall reside in the territorial jurisdiction of the governmental body making the appointment.

(B) Two members appointed by the Governor of California, one member appointed by the Speaker of the Assembly of California and one member appointed by the Senate Rules Committee of the State of California. The members appointed pursuant to this subparagraph shall not be resident of the region and shall represent the public at large within the State of California A member appointed by the Speaker of the Assembly or the Senate Rules Committee may, subject to confirmation by his or her appointing power, designate an alternate to attend meetings and vote in the absence of the appointed member.

The designation of a named alternate, which shall be in writing and contain evidence of confirmation by the appointing power, shall be kept on file with the agency. An appointed member may change his or her alternate from time to time, with the confirmation of the appointing power, but shall have only one designated alternate at a time. An alternate shall be subject to those qualifications and requirements prescribed by this compact that are applicable to the appointed member.

(2) Nevada delegation:

(A) One member appointed by each of the boards of county commissioners of Douglas and Washoe Counties and one member appointed by the Board of Supervisors of Carson City. Any such member may be a member of the board of county commissioners or board of supervisors, respectively, and shall reside in the territorial jurisdiction of the governmental body making the appointment.

(B) Two members appointed by the Governor of Nevada, one member appointed by the Speaker of the Assembly and one member appointed by the Majority Leader of the Nevada Senate. All members appointed pursuant to this subparagraph shall not be residents of the region and shall represent a pubic at large within the State of Nevada. A member appointed by the Speaker of the Nevada Assembly or the Majority Leader of the Nevada Senate may, subject to confirmation by his or her appointing power, designate an alternate to attend meetings and vote in the absence of the appointed member. The designation of a named alternate, which shall be in writing and contain evidence of confirmation

by the appointing power, shall be kept on file with the agency. An appointed member may change his or her alternate from time to time, with the confirmation of the appointing power, but shall have only one designated alternate at a time. An alternate shall be subject to those qualifications and requirements prescribed by this compact that are applicable to the appointed member.

(3) If any appointing authority under paragraph (1)(A), (1)(B), (2)(A) or (2)(B) fails to make such an appointment within 60 days after the effective date of the amendments to this compact or the occurrence of a vacancy on the governing body, the governor of the state in which the appointing authority is located shall make the appointment. The term of any member so appointed shall be 1 year.

(4) The position of any member of the governing body shall be deemed vacant if such a member is absent from three consecutive meetings of the governing body in any calendar year.

(5) Each member and employee of the agency shall disclose his economic interests in the region within 10 days after taking his seat on the governing board or being employed by the agency and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. As used in this paragraph, "economic interests" means:

(A) Any business entity operating in the region in which the member or employee has a direct or indirect investment worth more than one thousand dollars ($1,000).

(B) Any real property located in the region in which the member or employee has

a direct or indirect interest worth more than one thousand dollars ($1,000).

(C) Any source of income attributable to activities in the region, other than loans by or deposits with a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars ($250) or more in value received by or promised to the member within the preceding 12 months; or

(D) Any business entity operating in the region in which the member or employee is a director officer, partner, trustee, employee or holds any position of management.

No member or employee of the agency shall make, or attempt to influence, an agency decision in which he knows or has reason to know he has an economic interest. Members and employees of the agency must disqualify themselves from making or participating in the making of any decision of the agency when it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the economic interest of the member or employee.

(b) The members of the agency shall serve without compensation, but the expense of each member shall be met by the body which he represents in accordance with the law of that body. All other expenses incurred by the government body in the course of exercising the powers conferred upon it by this compact unless met in some other manner specifically provided, shall be paid by the agency out of its own funds.

(c) The members of the governing body serve at the pleasure of the appointing authority in each case, but each appointment shall be reviewed no less often than every 4 years. Members may be reappointed.

(d) The governing body of the agency shall meet at least monthly. All meetings shall be opened to the pubic to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held. The government body shall fix a date for its regular monthly meeting in such terms as "the first Monday of each month," and shall not change such date more often than once in any calendar year. Notice of the date so fixed shall be given by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region. Notice of any special meeting, except an emergency meeting, shall be given by so publishing the date and place and posting an agenda at least 5 days prior to the meeting.

(e) The position of a member of the governing body shall be considered vacated upon his loss of any of the qualifications required for his appointment and in such event the appointing authority shall appoint a successor.

(f) The governing body shall elect from its own members a chairman and vice chairman, whose terms of office shall be 2 years, and who may be reelected. If a vacancy occurs in either office, the governing body may fill such vacancy for the unexpired term.

(g) Four of the members of the governing body from each state constitute a quorum for the transaction of the business of the agency. The voting procedures shall be as follows:

> (1) For adopting, amending or repealing environmental threshold carrying capacities, the regional plan, and ordinances, rules and regulations, and for granting variances from the ordinances, rules and regulations, the vote of at least four of the members of the other state shall be required to take action. If there is no vote of at least four of the members from one state agreeing with the vote of at least four of the members of the

other state on the actions specified in this paragraph, an action of rejection shall be deemed to have been taken.

(2) For approving a project, the affirmative vote of at least five members from the state in which the project is located and the affirmative vote of at least nine members of the governing body are required. If at least five members of the governing body from the state in which the project is located and at least nine members of the entire governing body do not vote in favor of the project, upon a motion for approval, an action of rejection shall be deemed to have been taken. A decision by the agency to approve a project shall be supported by a statement of findings, adopted by the agency, which indicates that the project complies with the regional plan and with applicable ordinances, rules and regulations of the agency.

(3) For routine business and for directing the agency's staff on litigation and enforcement actions, at least eight members of the governing body must agree to take action. If at least eight votes in favor of such action are not cast, an action of rejection shall be deemed to have been taken.

Whenever under the provisions of this compact or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any project, public or private, the agency shall take final action by vote, whether to approve, to require modification or to reject such project, within 180 days after the application for such project is accepted as complete by the agency in compliance with the agency's rules and regulations governing such delivery unless the applicant has agreed to an extension of this time limit. If a final action by vote does not take place within 180 days, the applicant may bring an action in a court of competent jurisdiction to compel a vote unless he has agreed to an extension. This provision does not limit the right of any

person to obtain judicial review of agency action under subdivision (h) of Article VI. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

(h) An advisory planning commission shall be appointed by the agency. The commission shall include: the chief planning officers of Placer County, El Dorado County, and the City of South Lake Tahoe in California and of Douglas County, Washoe County and Carson City in Nevada, the executive officer of the Lahontan Regional Water Quality Control Board of the State of California, the executive officer of the Air Resources Board of the State of California, the Director of the State Department of Conservation and Natural Resources of the State of Nevada, the Administrator of the Division of Environmental Protection in the State Department of Conservation and Natural Resources of the State of Nevada, the Administrator of the Lake Tahoe Management Unit of the United States Forest Service, and at least four lay members with an equal number from each state, at least half of whom shall be residents of the region. Any official member may designate an alternate.

The term of office of each lay member of the advisory planning commission shall be 2 years. Members may be reappointed.

The position of each member of the advisory planning commission shall be considered vacated upon loss of any of the qualifications required or appointment, and in such an event the appointing authority shall appoint a successor.

The advisory planning commission shall elect from its own members a chairman, whose terms of office shall be 2 years and who may be reelected. If a vacancy occurs in either office, the advisory planning commission shall fill such vacancy for the unexpired term.

A majority of the members of the advisory planning commission constitutes a quorum for the transaction of the business of the commission. A majority vote of the quorum

present shall be required to take action with respect to any matter.

(i) The agency shall establish and maintain an office within the region, and for this purpose the agency may rent or own property and equipment. Every plan, ordinance and other record of the agency which is of such nature as to constitute a public record under the law of either the State of California or the State of Nevada shall be opened to inspection and copying during regular office hours.

(j) Each authority charged under this compact or by the law of either state with the duty of appointing a member of the government body of the agency shall by certified copy of its resolution or other action notify the Secretary of State of its own state of the action taken.

ARTICLE IV. PERSONNEL

(a) The governing body shall determine the qualification of, and it shall appoint and fix the salary of, the executive officer of the agency, and shall employ such other staff and legal counsel as may be necessary to execute the powers and functions provided for under this compact or in accordance with any intergovernmental contracts or agreements the agency may be responsible for administering.

(b) Agency personnel standards and regulations shall conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada, as may be determined by the governing body of the agency; and shall be regional and bistate in application and effect; provided that the governing may, for administrative convenience and at its discretion, assign the administration of designated personnel arrangements to an agency of either state, and provided that administratively convenient adjustments be made in the standards and regulations governing personnel assigned under intergovernmental agreements.

(c) The agency may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the agency terms and conditions of employment similar to those enjoyed by employees of California and Nevada generally.

ARTICLE V. PLANNING

(a) In preparing each of the plans required by this article and each amendment thereto, if any, subsequent to its adoption, the planning commission after due notice shall hold at least one public hearing which may be continued from time to time, and shall review the testimony and any written recommendations presented at such hearing before recommending the plan or amendment. The notice required by this subdivision shall be given at least 20 days prior to the public hearing by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region.

The planning commission shall then recommend such plan or amendment to the governing body for adoption by ordinance. The governing body may adopt, modify or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required in this subdivision.

If a request is made for the amendment of the regional plan by:

(1) A political subdivision a part of whose territory would be affected by such amendment; or

(2) The owner or lessee of real property which would be affected by such amendment,

the governing body shall complete its action on such amendment within 180 days after such request is accepted as complete according to standards which must be prescribed by ordinance of the agency.

(b) The agency shall develop, in cooperation with the States of California and Nevada, environmental threshold carrying capacities for the region. The agency should request the President's Council on Environmental Quality, the U.S. Forest Service and other appropriate agencies to assist in developing such environmental threshold carrying capacities. Within 18 months after the effective date of the amendments to this compact, the agency shall adopt environmental threshold carrying capacities for the region.

(c) Within 1 year after the adoption of the environmental threshold carrying capacities for the region, the agency shall amend the regional plan so that, at a minimum, the plan and all of its elements, as implemented through agency ordinances, rules and regulations, achieves and maintains the adopted environmental threshold carrying capacities. Each element of the plan shall contain implementation provisions and time schedules for such implementation by ordinance. The planning commission and governing body shall continuously review and maintain the regional plan. The regional plan shall consist of a diagram, or diagrams, and text, or texts setting forth the projects and proposals for implementation of the regional plan, a description of the needs and goals of the region and statement of the policies, standards and elements of the regional plan.

The regional plan shall be a single enforceable plan and include all of the following correlated elements:

(1) A land-use plan for the integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to, an indication or allocation of maximum population densities and permitted uses.

(2) A transportation plan for the integrated development of a regional system of transportation, including but not limited to parkways, highways, transportation facilities, transit routes, waterways, navigation facilities, public transportation facilities, bicycle facilities, and appurtenant terminals and facilities for the movement of people and goods within the region. The goal of transportation planning shall be:

(A) To reduce dependency on the automobile by making more effective use of existing transportation modes and of public transit to move people and goods within the region, and

(B) To reduce to the extent feasible air pollution which is caused by motor vehicles.

Where increases in capacity are required, the agency shall give preference to providing such capacity through public transportation and public programs and projects related to transportation. The agency shall review and consider all existing transportation plans in preparing its regional transportation plan pursuant to this paragraph.

The plan shall provide for an appropriate transit system for the region.

The plan shall give consideration to:

(A) Completion of the Loop Road in the States of Nevada and California;

(B) Utilization of a light rail mass transit system in the South Shore area; and

(C) Utilization of a transit terminal in the Kingsbury Grade area.

Until the regional plan is revised, or a new transportation plan is adopted in accordance with this paragraph, the agency has no effective transportation plan.

(3) A conservation plan for the preservation, development, utilization, and management of the scenic and other natural resources within the basin, including but not limited to, soils, shoreline and submerged lands, scenic corridors along transportation routes, open spaces, recreational and historical facilities.

(4) A recreation plan for the development, utilization, and management of the recreational resources of the region, including but not limited to, wilderness and forested lands, parks and parkways, riding and hiking trails, beaches and playgrounds, marinas, areas for skiing and other recreational facilities.

(5) A public services and facilities plan for the general location, scale and provision of public services and facilities, which, by the nature of their function, size, extent and other characteristics are necessary or appropriate for inclusion in the regional plan.

In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the state, federal and other public agencies and nongovernmental agencies and organizations which affect or are concerned with planning and development within the region.

(d) The regional plan shall provide for attaining and maintaining federal, state, or local air and water quality standards, whichever are strictest, in the respective portions of the region for which the standards are applicable.

The agency may, however, adopt air or water quality standards or control measures more stringent than the applicable state implementation plan or the applicable federal, state, or local standards for the region, if it finds that such additional standards or control measures are necessary to

achieve the purposes of this compact. Each element of the regional plan, where applicable, shall, by ordinance, identify the means and time schedule by which air and water quality standards will be attained.

(e) Except for the Regional Transportation Plan of the California Tahoe Regional Planning Agency, the regional plan, ordinances, rules and regulations adopted by the California Tahoe Regional Planning Agency in effect on July 1, 1980, shall be the regional plan, ordinances, rules and regulations of the Tahoe Regional Planning Agency for the portion of the Tahoe region located in the State of California. Such plan, ordinance, rule or regulation may be amended or repealed by the governing body of the agency. The plans, ordinances, rules and regulations of the Tahoe Regional Planning Agency that do not conflict with, or are not addressed by, the California Tahoe Regional Planning Agency's plans, ordinances, rules and regulations referred to in this subdivision shall continue to be applicable unless amended or repealed by the governing body of the agency. No provision of the regional plan, ordinances, rules and regulations of the California Tahoe Regional Planning Agency referred to in this subdivision shall apply to that portion of the region within the State of Nevada, unless such provision is adopted for the Nevada portion of the region by the governing body of the agency.

(f) The regional plan, ordinances, rules and regulations of the Tahoe Regional Planning Agency apply to that portion of the region within the State of Nevada.

(g) The agency shall adopt ordinances prescribing specific written findings that the agency must make prior to approving any project in the region. These findings shall relate to environmental protection and shall insure that the project under review will not adversely affect implementation of the regional plan and will not cause the adopted environmental threshold carrying capacities of the region to be exceeded.

(h) The agency shall maintain the data, maps and other information developed in the course of formulating and administering the regional plan, in a form suitable to assure a consistent view of developmental trends and other relevant information for the availability of and use by other agencies of government and by private organizations and individuals concerned.

(i) Where necessary for the realization of the regional plan, the agency may engage in collaborative planning with local governmental jurisdictions located outside the region, but contiguous to its boundaries. In formulating and implementing the regional plan, the agency shall seek the cooperation and consider the recommendations of counties and cities and other agencies of local government, of state and federal agencies, of educational institutions and research organizations, whether public or private, and of civic groups and private persons.

ARTICLE VI. AGENCY'S POWERS

(a) The governing body shall adopt all necessary ordinances, rules, and regulations to effectuate the adopted regional plan. Except as otherwise provided in this compact, every such ordinance, rule or regulation shall establish a minimum standard applicable throughout the region. Any political subdivision or public agency may adopt and enforce an equal or higher requirement applicable to the same subject of regulation in its territory. The regulations of the agency shall contain standards including but not limited to the following: Water purity and clarity; subdivision; zoning; tree removal; solid waste disposal; sewage disposal; land fills, excavations, cuts and grading; piers, harbors, breakwaters or channels and other shoreline developments; waste disposal in shoreline areas; waste disposal from boats; mobile-home parks; house relocation; outdoor advertising; flood plain protection; soil and sedimentation control; air pollution; and watershed protection. Whenever possible without diminish-

ing the effectiveness of the regional plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the regional plan.

The agency shall prescribe by ordinance those activities which it has determined will not have substantial effect on the land, water, air, space or any other natural resources in the region and therefore will be exempt from its review and approval.

Every ordinance adopted by the agency shall be published at least once by title in a newspaper or combination of newspapers whose circulation is general throughout the region. Except an ordinance adopting or amending the regional plan, no ordinance shall become effective until 60 days after its adoption. Immediately after its adoption, a copy of each ordinance shall be transmitted to the governing body of each political subdivision having territory within the region.

(b) No project other than those to be reviewed and approved under the special provisions of subdivisions (d), (e), (f) and (g) may be developed in the region without obtaining the review and approval of the agency and no project may be approved unless it is found to comply with the regional plan and with the ordinances, rules and regulations enacted pursuant to subdivision (a) to effectuate that plan. The agency may approve a project in the region only after making the written findings required by this subdivision or subdivision (g) of Article V. Such findings shall be based on substantial evidence in the record.

Before adoption by the agency of the ordinances required in subdivision (g) of Article V, the agency may approve a project in the region only after making written findings on the basis of substantial evidence in the record that the project is consistent with the regional plan then in effect and with applicable plans, ordinances, regulations and standards of federal and state agencies relating to the protection, mainte-

nance and enhancement of environmental quality in the region.

(c) The Legislatures of the States of California and Nevada find that in order to make effective the regional plan as revised by the agency, it is necessary to halt temporarily works of development in the region which might otherwise absorb the entire capability of the region for further development or direct it out of harmony with the ultimate plan. Subject to the limitation provided in this subdivision, from the effective date of the amendments to this compact until the regional plan is amended pursuant to subdivision (c) of Article V, or until May 1, 1983, whichever is earlier:

(1) Except as otherwise provided in this paragraph, no new subdivision, planned unit development, or condominium project may be approved unless a complete tentative map or plan has been approved before the effective date of the amendments to this compact by all agencies having jurisdiction. The subdivision of land owned by a general improvement district, which existed and owned the land before the effective date of the amendments to this compact, may be approved if subdivision of the land is necessary to avoid insolvency of the district.

(2) Except as provided in paragraph (3), no apartment building may be erected unless the required permits for such building have been secured from all agencies having jurisdiction, prior to the effective date of the amendments to this compact.

(3) During each of the calendar years 1980, 1981, and 1982 no city or county may issue building permits which authorize the construction of the greater number of new residential units within the region than were authorized within the region by building permits issued by that city or county during calendar year 1978. For the period of

January through April, 1983 building permits authorizing the construction of no more than 1/3 of that number may be issued by each such city or county. For purposes of this paragraph a "residential unit" means either a single family residence or an individual residential unit within a larger building, such as an apartment building, a duplex or a condominium.

The Legislatures find the respective numbers of residential units authorized within the region during calendar year 1978 to be a follows:

1. City of South Lake Tahoe and El Dorado County (combined).....252
2. Placer County.....278
3. Carson City 0
4. Douglas County 339
5. Washoe County 739

(4) During each of the calendar years 1980, 1981 and 1982, no city or county may issue building permits which authorize construction of a greater square footage of new commercial buildings within the region than were authorized within the region by building permits for commercial purposes issued by that city or county during the calendar year 1978. For the period of January through April, 1983 building permits authorizing the construction of no more than 1/3 the amount of that square footage may be issued by each such city or county.

The Legislatures find the respective square footages of commercial buildings authorized within the region during calendar year 1978 to be as follows:

1. City of South Lake Tahoe and El Dorado County (combined) 64,324
2. Placer County 23,000
3. Carson City 0
4. Douglas County 57,354
5. Washoe County 50,600

(5) No structure may be erected to house gaming under a nonrestricted license.

(6) No facility for the treatment of sewage may be constructed or enlarged except:

(A) To comply, as ordered by the appropriate state agency for the control of water pollution, with existing limitations of effluence under the Clean Water Act, 33 U.S.C. §1251 et seq., and the applicable state law for control of water pollution; or

(B) To accommodate development which is not prohibited or limited by this subdivision; or

(C) In the case of Douglas County Sewer District #1, to modify or otherwise alter sewage treatment facilities existing on the effective date of the amendments to this compact so that such facilities will be able to treat the total volume of effluence for which they were originally designed which is 3.0 mgd. Such modification or alteration is not a "project"; is not subject to the requirements of Article VII; and does not require a permit from the agency. Before commencing such modification or alternative, however, the district shall submit to the agency its report identifying any significant soil erosion problems which may be caused by such modifications or alterations

and the measures which the district proposes to take to mitigate or avoid such problems.

The moratorium imposed by this subdivision does not apply to work done pursuant to a right vested before the effective date of the amendments to this compact. Notwithstanding the expiration date of the moratorium imposed by this subdivision, no new highway may be built or existing highway widened to accommodate additional continuous lanes for automobiles until the regional transportation plan is revised and adopted.

The moratorium imposed by this subdivision does not apply to the construction of any parking garage which has been approved by the agency prior to May 4, 1979, whether that approval was affirmative or by default. The provisions of this paragraph are not an expression of legislative intent that any such parking garage, the approval of which is the subject of litigation which was pending on the effective date of the amendments to this compact, should, or should not, be constructed. The provisions of this paragraph are intended solely to permit construction of such a parking garage if judgment sustaining the agency's approval to construct that parking garage has become final and no appeal is pending or may lawfully be taken to a higher court.

(d) Subject to the final order of any court of competent jurisdiction entered in litigation contesting the validity of an approval by the Tahoe Regional Planning Agency, whether that approval was affirmative or by default, if that litigation was pending on May 4, 1979, the agency and the States of California and Nevada shall recognize as a permitted and conforming use:

(1) Every structure housing gaming under a nonrestricted license which existed as a licensed gaming establishment on May 4, 1979, or whose construction was approved by the Tahoe Regional Planning Agency affirmatively or deemed approved before that date. The construction or use of any structure to house gaming under a nonrestricted

license not so existing or approved, or the enlargement in cubic volume of any such existing or approved structure is prohibited.

(2) Every other nonrestricted gaming establishment whose use was seasonal and whose license was issued before May 4, 1979, for the same season and for the number and type of games and slot machines on which taxes or fees were paid in the calendar year 1978.

(3) Gaming conducted pursuant to a restricted gaming license issued before May 4, 1979, to the extent permitted by the license on that date.

The area within any structure housing gaming under a nonrestricted license which may be open to public use (as distinct from that devoted to the private use of guests and exclusive of any parking area) is limited to the area existing or approved for public use on May 4, 1979. Within these limits, any external modification of the structure which requires a permit from a local government also requires approval from the agency. The agency shall not permit restaurants, convention facilities, showrooms or other public areas to be constructed elsewhere in the region outside the structure in order to replace areas existing or approved for public use on May 4, 1979.

(e) Any structure housing licensed gaming may be rebuilt or replaced to a size not to exceed the cubic volume, height and land coverage existing or approved on May 4, 1979, without the review or approval of the agency or any planning or regulatory authority of the State of Nevada whose review or approval would be required for a new structure.

(f) The following provisions apply to any internal or external modification, remodeling, change in use, or repair of a structure housing gaming under a nonrestricted license which is not prohibited by article VI(d):

(1) The agency's review of an external modification of the structure which requires a permit from a local government is limited to determining whether the external modification will do any of the following:

(A) Enlarge the cubic volume of the structure;

(B) Increase the total square footage of area open to or approved for public use on May 4, 1979;

(C) Convert an area devoted to the private use of guests to an area open to public use;

(D) Increase the public area open to public use which is used for gaming beyond the limits contained in paragraph (3); and

(E) Conflict with or be subject to the provisions of any of the agency's ordinances that are generally applicable throughout the region.

The agency shall make this determination within 60 days after the proposal is delivered to the agency in compliance with the agency's rules or regulations governing such delivery unless the applicant has agreed to an extension of this time limit. If an external modification is determined to have any of the effects enumerated in subparagraphs (A) through (C), it is prohibited. If an external modification is determined to have any of the effects enumerated in subparagraphs (D) or (E), it is subject to the applicable provisions of this compact. If an external modification is determined to have no such effect, it is not subject to the provisions of this compact.

(2) Except as provided in paragraph (3), internal modification, remodeling, change in use or repair of a structure housing gaming under a nonrestricted license is not a project and does not require the review or approval of the agency.

(3) Internal modification, remodeling, change in use or repair of areas open to the public use within a structure housing gaming under a nonrestricted license which alone or in combination with any other such modification, remodeling, change in use or repair will increase the total portion of those areas which are used for gaming by more than the product of the total base area, as defined below, in square feet existing on or approved before August 4, 1980, multiplied by 15 percent constitutes a project and is subject to all of the provisions of this compact relating to projects. For purposes of this paragraph and the determination required by subdivision (g), base area means all of the area within a structure housing gaming under a nonrestricted license which may be open to public use, whether or not gaming is actually conducted or carried on in that area, except retail stores, convention centers and meeting rooms, administrative offices, kitchens, maintenance and storage areas, rest rooms, engineering and mechanical rooms, accounting rooms and counting rooms.

(g) In order to administer and enforce the provisions of subdivisions (d), (e) and (f), the State of Nevada, through its appropriate planning or regulatory agency, shall require the owner or licensee of a structure housing gaming under a nonrestricted license to provide:

(1) Documents containing sufficient information for the Nevada agency to establish the following relative to the structure:

(A) The location of its external walls;

(B) Its total cubic volume;

(C) Within its external walls, the area in square feet open or approved for public use and the area in square feet devoted to or approved for the private use of guests on May 4, 1979;

(D) The amount of surface area of land under the structure; and

(E) The base area as defined in paragraph (3) of subdivision (f) in square feet existing on or approved before August 4, 1980.

(2) An informational report whenever any internal modification, remodeling, change in use, or repair will increase the total portion of the areas open to public use which is used for gaming.

The Nevada agency shall transmit this information to the Tahoe Regional Planning Agency.

(h) Gaming conducted pursuant to a restricted gaming license is exempt from review by the agency if it is incidental to the primary use of the premises.

(i) The provisions of subdivisions (d) and (e) are intended only to limit gaming and related activities as conducted within a gaming establishment, or construction designed to permit the enlargement of such activities, and not to limit any other use of property zoned for commercial use or the accommodation of tourists, as approved by the agency.

(j) Legal actions arising out of or alleging a violation of the provisions of this compact, of the regional plan or of an ordinance or regulation of the agency or of a permit or a condition of a permit issued by the agency are governed by the following provisions:

(1) This subdivision applies to:

(A) Actions arising out of activities directly undertaken by the agency.

(B) Actions arising out of the issuance to a person of a lease, permit, license or other entitlement for use by the agency.

(C) Actions arising out of any other act or failure to act by any person or public agency.

Such legal actions may be filed and the provisions of this subdivision apply equally in the appropriate courts of California and Nevada and of the United States.

(2) Venue lies:

(A) If a civil or criminal action challenges an activity by the agency or any person which is undertaken or to be undertaken upon a parcel of real property, in the state or federal judicial district where the real property is situated.

(B) If an action challenges an activity which does not involve a specific parcel of land (such as an action challenging an ordinance of the agency), in any state or federal court having jurisdiction within the region.

(3) Any aggrieved person may file an action in an appropriate court of the State of California or Nevada or of the United States alleging noncompliance with the provisions of this compact or with an ordinance or regulation of the agency. In the case of governmental agencies, "aggrieved person" means the Tahoe Regional planning Agency or any state, federal or local agency. In the case of any person other than a governmental agency who challenges an action of the Tahoe Regional Planning Agency, "aggrieved person" means any person who has appeared, either in person, through an authorized representative, or in writing, before the agency at an appropriate administrative hearing to

register objection to the action which is being challenged, or who had good cause for not making such an appearance.

(4) A legal action arising out of the adoption or amendment of the regional plan or of any ordinance or regulation of the agency, or out of the granting or denial of any permit, shall be commenced within 60 days after final action by the agency. All other legal actions shall be commenced within 65 days after discovery of the cause of action.

(5) In any legal action filed pursuant to this subdivision which challenges an adjudicatory act or decision of the agency to approve or disapprove a project, the scope of judicial inquiry shall extend only to whether there was prejudicial abuse of discretion. Prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law or if the act or decision of the agency was not supported by substantial evidence in light of the whole record. In making such a determination the court shall not exercise its independent judgment on evidence but shall only determine whether the act or decision was supported by substantial evidence in light of the whole record. In any legal action filed pursuant to this subdivision which challenges a legislative act or decision of the agency (such as the adoption of the regional plan and the enactment of implementing ordinances), the scope of the judicial inquiry shall extend only to the questions of whether the act or decision has been arbitrary, capricious or lacking substantial evidentiary support or whether the agency has failed to proceed in a manner required by law.

(6) The provisions of this subdivision do not apply to any legal proceeding pending on the date when this subdivision becomes effective. Any such legal proceeding shall be conducted and concluded under the provisions of law which were applicable prior to the effective date of this subdivision.

(7) The security required for the issuance of a temporary restraining order or preliminary injunction based upon an alleged violation of this compact or any ordinance, plan, rule or regulation adopted pursuant thereto is governed by the rule or statute applicable to the court in which the action is brought unless the action is brought by a public agency or political subdivision to enforce its own rules, regulations and ordinances in which case no security shall be required.

(k) The agency shall monitor activities in the region and may bring enforcement actions in the region to ensure compliance with the regional plan and adopted ordinances, rules, regulations and policies. If it is found that the regional plan, or ordinances, regulations and policies are not being enforced by a local jurisdiction, the agency may bring action in a court of competent jurisdiction to ensure compliance.

(l) Any person who violates any provision of this compact or of any ordinance or regulation of the agency or of any condition of approval imposed by the agency is subject to a civil penalty not to exceed five thousand dollars ($5,000). Any such person is subject to an additional civil penalty not to exceed five thousand dollars ($5,000) per day, for each day on which such a violation persists. In imposing the penalties authorized by this subdivision, the court shall consider the nature of the violation and shall impose a greater penalty if it was willful or resulted from gross negligence than if it resulted from inadvertence or simple negligence.

(m) The agency is hereby empowered to initiate, negotiate and participate in contracts and agreements among the local governmental authorities of the region, or any other intergovernmental contracts or agreements authorized by state or federal law.

(n) Each intergovernmental contract or agreement shall provide for its own funding and staffing, but this shall not preclude financial contributions from the local authorities concerned or from supplementary sources.

(o) Every record of the agency, whether public or not, shall be open for examination to the Legislature and Controller of the State of California and the Legislative Auditor of the State of Nevada.

(p) Approval by the agency of any project expires 3 years after the date of final action by the agency or the effective date of the amendments to this compact, whichever is later, unless construction is begun within that time and diligently pursued thereafter, or the use or activity has commenced. In computing the 3-year period any period of time during which the project is the subject of a legal action which delays or renders impossible the diligent pursuit of that project shall not be counted. Any license, permit or certificate issued by the agency which has an expiration date shall be extended by that period of time during which the project is the subject of such legal action as provided in this subdivision.

(q) The governing body shall maintain a current list of real property known to be available for exchange with the United States or with other owners of real property in order to facilitate exchanges of real property by owners of real property in the region.

ARTICLE VII. ENVIRONMENTAL IMPACT STATEMENTS

(a) The Tahoe Regional Planning Agency when acting upon matters that have a significant effect on the environment shall:

(1) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(2) Prepare and consider a detailed environmental impact statement before deciding to approve or carry out any project. The detailed environmental impact statement shall include the following:

(A) The significant environmental impacts of the proposed project;

(B) Any significant adverse environmental effects which cannot be avoided should the project be implemented;

(C) Alternatives to the proposed project;

(D) Mitigation measures which must be implemented to assure meeting standards of the region;

(E) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;

(F) Any significant irreversible and irretrievable commitments of resources which would be involved in the proposed project should it be implemented; and

(G) The growth-inducing impact of the proposed project;

(3) Study, develop and describe appropriate alternatives to recommended courses of action for any project which involves unresolved conflicts concerning alternative uses of available resources;

(4) Make available to States, counties municipalities, institutions and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the region's environment; and

(5) Initiate and utilize ecological information in the planning and development of resource-oriented projects.

(b) Prior to completing an environmental impact statement, the agency shall consult with and obtain the comments of any federal, state or local agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, state and local agencies which are authorized to develop and enforce environmental standards shall be made available to the public and shall accompany the project through the review processes. The public shall be consulted during the environmental impact statement process and views shall be solicited during a public comment period not to be less than 60 days.

(c) Any environmental impact statement required pursuant to this article need not repeat in its entirety any information or data which is relevant to such a statement and is a matter of public record or is generally available to the public, such as information contained in an environmental impact report prepared pursuant to the California Environmental Quality Act or a federal environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969. However, such information or data shall be briefly described in the environmental impact statement and its relationship to the environmental impact statement shall be indicated.

In addition, any person may submit information relative to a proposed project which may be included, in whole or in part, in any environmental impact statement required by this article.

(d) In addition to the written findings specified by agency ordinance to implement the regional plan, the agency shall make either of the following written findings before approving a project for which an environmental impact statement was prepared:

(1) Changes or alterations have been required in or incorporated into such project which avoid or reduce the significant adverse environmental effects to a less than significant level; or

(2) Specific considerations, such as economic, social or technical, make infeasible the mitigation measures or project alternatives discussed in the environmental impact statement on the project.

A separate written finding shall be made for each significant effect identified in the environmental impact statement on the project. All written findings must be supported by substantial evidence in the record.

(e) The agency may charge and collect a reasonable fee from any person proposing a project subject to the provisions fo this compact in order to recover the estimated costs incurred by the agency in preparing an environmental impact statement under this article.

(f) The agency shall adopt by ordinance a list of classes of projects which the agency has determined will not have a significant effect on the environment and therefore will be exempt from the requirement for the preparation of an environmental impact statement under this article. Prior to adopting the list, the agency shall make a written finding supported by substantial evidence in the record that each class of projects will not have a significant effect on the environment.

ARTICLE VIII. FINANCES

(a) On or before September 30 of each calendar year the agency shall establish the amount of money necessary to support its activities for the next succeeding fiscal year commencing July 1 of the following year. The agency shall apportion $75,000 of this amount among the counties within the region on the same ratio to the total sum required as the full cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region. In addition, each county within the region in California shall pay $18,750 to the agency and each county within the region in Nevada, including Carson City, shall pay $12,500 to the agency, from any funds available therefore. The State of California and the State of Nevada may pay to the agency by July 1, of each year any additional sums necessary to support the operations of the agency pursuant to this compact. If additional funds are required, the agency shall make a request for the funds to the States of California and Nevada. Requests for state funds must be apportioned two-thirds from California and one-third from Nevada. Money appropriated shall be paid within 30 days.

(b) The agency may fix and collect reasonable fees for any services rendered by it.

(c) The agency shall submit an itemized budget to the states for review with any request for state funds, shall be strictly accountable to any county in the region and the states for all funds paid by them to the agency and shall be strictly accountable to all participating bodies for all receipts and disbursement.

(d) The agency is authorized to receive gifts, donations, subventions, grants, and other financial aids and funds; but the agency may not own land except as provided in subdivision (i) of Article III.

(e) The agency shall not obligate itself beyond the moneys due under this article for its support from the several

counties and the states for the current fiscal year, plus any moneys on hand or irrevocably pledged to its support from other sources. No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof.

ARTICLE IX. TRANSPORTATION DISTRICT

(a) The Tahoe transportation district is hereby established as a special purpose district. The boundaries of the district are coterminous with those of the region.

(b) The business of the district shall be managed by a board of directors consisting of:

(1) One member of the county board of supervisors of each of the counties of El Dorado and Placer;

(2) One member of the city council of the City of South Lake Tahoe;

(3) One member each of the board of county commissioners of Douglas County and of Washoe County;

(4) One member of the board of supervisors of Carson City.

(c) The vote of at least four of the directors must agree to take action. If at least four votes in favor of an action are not cast, an action of rejections shall be deemed to have been taken.

(d) The Tahoe transportation district may in accordance with the adopted transportation plan:

(1) Own and operate a public transportation system to the exclusion of all other publicly owned transportation systems in the region.

(2) Acquire upon mutually agreeable terms any public transportation system or facility owned by a county, city or special purpose district or any

privately owned transportation system or facility within the region.

(3) Hire the employees of existing public transportation systems that are acquired by the district without loss of benefits to the employees, bargain collectively with employee organizations, and extend pension and other collateral benefits to employees.

(4) Fix the rates and charges for transit services provided pursuant to this subdivision.

(5) Issue revenue bonds and other evidence of indebtedness.

(6) By resolution, determine and propose for adoption a tax for the purpose of obtaining services of the district. The tax proposed must be general and of uniform operation throughout the region, and may not be graduated in any way. The district is prohibited from imposing an ad valorem tax, a tax measured by gross or net receipts on business, a tax or charge that is assessed against people or vehicles as they enter or leave the region, and any tax, direct or indirect, on gaming tables and devices.

Any such proposition must be submitted to the voters of the district and shall become effective upon approval of a majority of the voters voting on the proposition. The revenues from any such tax must be used for the services for which it was imposed, and for no other purpose.

(7) Provide service from inside the region to convenient airport, railroad and interstate bus terminals without regard to the boundaries of the region.

(e) The Legislatures of the States of California and Nevada may, by substantively identical enactments, amend this aricle.

ARTICLE X. MISCELLANEOUS

(a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. Except as provided in subdivision (c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining state and in full force and effect as to the state affected as to all severable matters.

(b) The agency shall have such additional power and duties as may hereafter be delegated or imposed upon it from time to time by the action of the Legislature of either state concurred in by the Legislature of the other.

(c) A state party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other state and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California.

(d) No provision of this compact shall have any effect upon the allocation, distribution or storage of interstate waters or upon any appropriate water right.

Sec. 2. The Secretary of agriculture and the heads of other appropriate agencies are authorized, upon the request of the Tahoe Regional Planning Agency, to cooperate with the Tahoe Regional Planning Agency in all respects compatible with carrying out the normal duties of their agencies.

Sec. 3. The consent to the compact by the United States is subject to the condition that the President may appoint a nonvoting representative of the United States to the governing body of the Tahoe Regional Planning Agency.

Sec. 4. Any additional powers conferred on the agency pursuant to article X, section 1(b) of the compact shall not be exercised unless consented to by the Congress.

Sec. 5. Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States.

Sec. 6. The right is hereby reserved by the Congress or any of its standing committees to require the disclosure and furnishing of such information and data by or concerning the Tahoe Regional Planning Agency as is deemed appropriate by the Congress or such committee.

Sec. 7. The right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved December 19, 1980.

REGIONAL PLAN FOR THE LAKE TAHOE BASIN

CODE OF ORDINANCES

Adopted by the Governing Board

May 27, 1987

Tahoe Regional Planning Agency

[Reproduced verbatim, without its technical appendices.]

CHAPTER 37

~~Individual~~ Parcel Evaluation System

Chapter Contents

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37.0 Purpose: This chapter establishes the individual Parcel Evaluation System (IPES), and related procedures, in accordance with Goal #1, Policy #1 of the Development and Implementation Priorities Subelement, Implementation Element of the Goals and Policies. By December 31, 1988 all vacant residential parcels shall be evaluated, assigned a numerical score and ranked within each local jurisdiction from most suitable to least suitable for development in accordance with this chapter.

37.1 Applicability: Commencing on January 1, 1989, review and approval by TRPA of the construction of single family dwellings shall be in accordance with IPES. Review and approval of applications for construction of single family dwellings under IPES shall not commence until all vacant residential parcels have been scored and ranked in accordance with IPES.

37.2 Evaluation Criteria: IPES shall evaluate and assign a numerical score in accordance with the following criteria:

37.2.A Relative Erosion Hazard: The maximum score for relative erosion hazard is 450 points. The formulae set forth in Section A of the Technical Appendices shall be used to assign a Relative Erosion Hazard (REH) score to each parcel.

37.2.B Runoff Potential: The maximum score for runoff potential is 200 points. Each parcel shall receive a score for runoff potential in accordance with Table B-1 of the Technical Appendices. The Hydrologic Soil Group shall be determined for each soil series from Table 6 of the report entitled, "Soil Survey, Tahoe Basin Area, California and Nevada," prepared by the Soil Conservation Service and Forest Service, and dated March 1974. The categories under Hydrologic Conditions in Table B-1 shall be defined as follows:

(1) Poor - Thin or sparse cover denoting less than 50 percent of the ground surface protected by litter, or by plant cover.
(2) Fair - Moderate or scattered cover denoting from 50 percent to 75 percent of the ground surface protected by litter or by plant cover.
(3) Good - Heavy or dense cover denoting more than 75 percent of the ground surface protected by litter or plant cover.

37.2.C Degree Of Difficulty To Access Building Site: The maximum score for degree of difficulty to access building site is 170 points. Each parcel shall receive a score in accordance with the provisions of Subparagraphs (1), (2) or (3), and Subparagraph (4), below. Parcels that are not required to provide

vehicular access to the building site, such as parcels in plan unit developments where common parking areas exist, shall receive the maximum score for this subsection.

(1) Upsloping Parcels Without Existing Access: Parcels without existing access, that slope predominantly upward within the first 20 feet from the public right-of-way or other access road, shall receive an initial score in accordance with Table C-1 of the Technical Appendices. The height of the cut slope shall be measured at the center of the most likely point of access. The Degree of Difficulty for Excavation shall be determined for each soil series from Table 6 of the report entitled "Soil Survey, Tahoe Basin Area, California and Nevada," prepared by the Soil Conservation Service and Forest Service and dated March, 1974. Where construction of access will intercept natural ground water or subsurface flow, or result in disturbance in a SEZ, the parcel shall receive the appropriate score from the column in Table C-1 headed "SEZ."

(a) Adjustment For Gradient Above Cut Slope: The initial score received in accordance with the procedure set forth in Subparagraph (1), above, shall be multiplied by the factor from Table C-2 of the Technical Appendices according to the average gradient of the ground for a distance of 20 feet above the top of the cut slope at the access point.

(2) Downsloping Parcels Without Existing Access: Parcels that slope predominantly downward within the first 20 feet from the public right-

of-way or other access road shall receive an initial score in accordance with Table C-3 of the Technical Appendices. The height of the fill slope shall be measured at the center of the most likely point of access. Where construction of access will intercept natural ground water or subsurface flow, or result in disturbance in a SEZ, the parcel shall receive the appropriate score from the column in Table C-3 headed SEZ.

(a) Adjustment For Gradient Below Fill Slope: The initial score received in accordance with the procedure set forth in Subparagraph (2), above, shall be multiplied by the factor from Table C-4 of the Technical Appendices according to the average gradient of the ground for a distance of 20 feet below the toe of the fill slope at the access point.

(3) Parcels With Existing Driveways: Parcels that contain existing driveways shall receive a score in accordance with Table C-5 of the Technical Appendices. Where the existing driveway has intercepted natural ground water or subsurface flow, or resulted in disturbance in a SEZ, the parcel shall receive the appropriate score from the column headed "SEZ" in Table C-5.

(a) Extent Of Grading Required On Access: The categories under the column headed "Extent of Grading Required on Access" in Table C-5 shall be defined as follows:

(i) No Appreciable Grading: To achieve a maximum slope of ten percent on the driveway, the only grading required prior to paving is minor smoothing or leveling of the existing surface or the driveway is paved.

(ii) Minor Grading: To achieve a maximum slope of ten percent on the driveway, the extent of grading does not exceed a depth of 3 feet at any point.

(iii) Major Grading: To achieve a maximum slope of ten percent on the driveway, the extent of grading does exceed a depth of three feet at any point.

(b) Excavation For Parking Area Or Garage: The categories under the column headed "Excavation for Parking Area or Garage" in Table C-5 shall be defined as follows:

(i) None: The excavation required to construct a parking area or garage does not exceed the amount necessary to construct a conventional foundation.

(ii) Less Than Three Feet: The excavation required to construct a parking area or garage exceeds the amount necessary to construct a conventional foundation, but does not exceed a depth of three feet at any point.

(iii) Greater Than Three Feet: The excavation required to construct a

parking area or garage exceeds a depth of three feet at any point.

(4) Parcels Requiring Access Through A Stream Environment Zone: Parcels requiring construction of, or with existing access in, a stream environment zone, or parcels where access will intercept natural ground water or subsurface flow, shall receive a score, in addition to the score received under Subparagraph (1), (2) or (3) in this subsection, in accordance with Table C-6 of the Technical Appendices.

(a) Location Of Disturbance: The categories under the column headed "Location of Disturbance" in Table C-6 shall be defined as follows:

(i) No Disturbance In Stream Environment Zone Or Interception Of Ground Water: Provision of access to the building site will not result in any disturbance, including the removal of vegetation, in a stream environment zone or interception of ground water.

(ii) Disturbance Only In Secondary Riparian Vegetation Or Setback: Provision of access to the building site will result in disturbance only to secondary riparian vegetation, or within the setback to a stream environment zone, but will not result in disturbance to primary riparian vegetation, a stream channel or interception of ground water.

(iii) Disturbance In Primary Riparian Vegetation Or Intercepts Ground Water, But Not In Stream Channel:

Provision of access to the building site will result in disturbance to primary riparian vegetation, or intercept of ground water but will not result in disturbance to a stream channel.

(iv) Disturbance In Stream Channel: Provision of access to the building site will result in disturbance to a stream channel.

37.2.D Stream Environment Zone: The maximum score for stream environment zone is 110 points. Each parcel shall receive a score in accordance with Table D-1 of the Technical Appendices.

(1) Type Of Disturbance In Stream Environment Zone: Construction of vehicular access through a SEZ is accounted for under Subparagraph (4) of Subsection 37.2.C, and is not considered under this subsection. The categories under the column headed "Extent Of Disturbance In SEZ" in Table D-1 shall be defined as follows:

(a) None: Trenching for utility connections will not result in disturbance in a SEZ.

(b) Utility Connections: Trenching for utility connections will result in disturbance in a SEZ.

(2) Location Of Disturbance: The categories under the column headed "Location Of Disturbance" in Table D-1 shall be defined as follows:

(a) Inside Secondary Riparian Vegetation Or Setback: Trenching for utility connections will result in disturbance to secondary

riparian vegetation or within a set back, but not to primary riparian vegetation or a stream channel.

(b) Inside Primary Riparian Vegetation But Not In Stream Channel: Trenching for utility connections will result in disturbance to primary riparian vegetation but not to a stream channel.

(c) In Stream Channel: Trenching for utility connections will result in disturbance to a stream channel.

37.2.E Condition Of Watershed: The maximum score for condition of watershed is 70 points. Each parcel shall receive the score given in Table E-1 of the Technical Appendices to the watershed in which the parcel is located. This element estimates the overall ability of a drainage basin to deliver nutrients and sediments to Lake Tahoe. Consideration was given to three broad categories:

(1) Geomorphic, precipitation and stream flow characteristics;
(2) Nutrients and sediments in stream flow, expressed in production per unit area of drainage basin, e.g. pounds of nitrate nitrogen per square mile of drainage basin; and
(3) Existing land coverage compared to allowable land coverage.

37.2.F Ability To Revegetate: The maximum score for ability to revegetate is 50 points. Each parcel shall receive a score in accordance with the following provisions:

(1) Vegetative Groups: Parcels shall receive a score from Table F-1 of the Technical Appendices based on the vegetative group identified

in Table 6 of the report entitled, "Soil Survey, Tahoe Basin Area, California and Nevada," prepared by the Soil Conservation Service and Forest Service, and dated March 1974 for the soil series in which the parcel is located. If Vegetative Group J is identified for a parcel, the IPES field evaluation team shall determine which of the other five groups listed in Table F-1 best describes the vegetation on the parcel and points shall be assigned accordingly. The five vegetative groups, Groups A, B, E, F, and G are described in Section F of the Technical Appendices.

(2) Climatic Conditions: Parcels shall receive a score for climatic conditions as follows:

(a) Aspect And Gradient: Each parcel shall receive a score in accordance with Graph F-1 of the Technical Appendices, based on the aspect and average gradient of the parcel.

(b) Elevation: Each parcel shall receive a score in accordance with Table F-2 of the Technical Appendices. The elevation of a parcel, for purposes of determining a score from Table F-2, shall be the highest elevation within the area evaluated as determined pursuant to Section 37.4 Elevation readings shall be taken from TRPA's 2" = 1 miles base map.

37.2.G Need For Water Quality Improvements In Vicinity Of Parcel: The maximum score for need for water quality improvements in vicinity of parcel is 50 points.

(1) Preparation Of Map: TRPA shall prepare a map identifying areas within which the need for the water quality improvements listed in Table G-1 of the Technical Appendices is the same. The Lake Tahoe Basin Water Quality Management Plan (208 Plan) maps shall be used as a guideline for determining the level of improvements needed. Areas shall be assigned point values in accordance with Table G-1 of the Technical Appendices. The points assigned shall be equal to the mathematical difference between 50 points and the total of the negative points received due to the combination of water quality improvements needed.

(2) Assigning Scores To Parcels: Each parcel shall receive the score assigned to the area, established under Subparagraph (1), above, in which the parcel is located.

37.2.H Proximity To Lake Tahoe: The maximum score for proximity to Lake Tahoe is 50 points.

(1) Preparation Of Map: TRPA shall prepare maps identifying the following areas; Area A - from the highwater line (6229.1 feet Lake Tahoe Datum) of Lake Tahoe to elevation 6240 feet; Area B - from elevation 6240 feet to one mile from the high water line; Area C - from one mile to two miles from the high water line; Area D - from two miles to three miles from the high water line; Area E - from three miles to four miles from the high water line; and Area F - beyond four miles from the high water line. Point values shall be assigned to the areas set forth above as follows; Area A - 0 points; Area B - 10 points; Area C - 20 points; Area D - 30 points; Area E - 40 points; and Area F - 50 points.

(2) Assigning Scores To Parcels: Each parcel shall receive the score assigned to the area, established under Subparagraph (1), above, in which the parcel is located.

37.2.I Additional Mitigation: A parcel's score may be increased by an amount, not to exceed that permitted under Subparagraph (2) below, upon approval by TRPA of a water quality improvement project, submitted by the owner of the parcel. A project that qualifies a parcel for an increase in its point score shall be located on a parcel other than the parcel for which the score increase is proposed, and shall be improvements such as slope stabilization, energy dissipators, sediment ponds, and rocklined channels. A parcel's score shall not be increased unless, as a condition of approval, TRPA requires the water quality improvement project to be completed prior to construction commencing on the parcel receiving the increase in score. Approvals for additional points shall not be granted under the provisions of this subsection until TRPA makes the following findings:

(1) Required Findings: The required findings are:

(a) The water quality improvements proposed under the provisions of this subsection are consistent with TRPA's 208 Plan;
(b) The increase in the IPES score for the applicant's parcel is in compliance with paragraph (2) below; and
(c) The proposed water quality improvements would not otherwise be required of the owner to comply with the standards set forth in Chapter 25.

(2) Limitations On Amount Of Increase In Score: A parcel's score shall not be increased in an amount greater than ten percent of the IPES score at which the line is located establishing the top-ranked parcels in the affected jurisdiction at the time the water quality improvement project is approved. TRPA shall adopt a list assigning point values to types of water quality improvements. Point values shall be based on projected reductions in nutrient or sediment loading resulting from construction of such improvements and shall be intended to result in benefits that fully offset the difference in impacts between developing the subject parcel and developing a parcel with a rating equivalent to the subject parcel's rating without applying the bonus points.

37.2.J Man-Modified Areas: Where an area has been determined by TRPA to be man-modified in accordance with Subsection 20.2.F, or prior to the effective date of the Regional Plan in accordance with Section 8.29 of the TRPA Land Use Ordinance, the IPES filed evaluation team shall use the information on which such a determination was made, where applicable, in its evaluation of parcels located in such areas.

37.3 Procedure For Establishing SEZ Boundaries And Setbacks: The IPES field evaluation teams shall use the following procedures and definitions for purposes of determining the presence and boundaries of an SEZ and establishing SEZ setbacks.

37.3.A Definitions: The definitions are as follows:

(1) Alluvial Soils - All the following soil types owe their major characteristics to the presence of surface or subsurface water:
   (a) Loamy alluvial land (Lo)
   (b) Elmira loamy coarse sand, wet variant (Ev)
   (c) Celio gravelly loamy coarse sand (Co)
   (d) Marsh (Mh)
   (e) Gravelly alluvial land (Gr)
   (f) Fill land (Fd)

(2) Confined - Stream types classified under major categories A and B, and stream type C2, as defined in the report entitled "A Stream Classification System," David L. Rosgen, April, 1985.

(3) Designated Flood Plain - The limits of the Intermediate Regional Flood where established for creeks by the U.S. Army Corps of Engineers, or the limits of the 100-year flood where established for creeks by the U.S. Army Corps of Engineers.

(4) Ephemeral Stream - Flows sporadically only in response to precipitation, with flows lasting a short time.

(5) Groundwater Between 20-40 Inches - Evidence of ground water between 20 and 40 inches below the ground surface (somewhat poorly drained soil).

(6) Intermittent Stream - Flows in response to precipitation or snow melt.

(7) Lake - A water body greater than 20 acres in size, exceeding two meters deep at low water and lacking trees, shrubs, persistent emergents, emergent mosses or lichens with greater than 20 percent aerial coverage.

(8) Man-Made Channel - A channel constructed by man for the purpose of conveying water or a channel created by water being discharged from a man-made source, such as a culvert or pipe.

(9) Near Surface Groundwater - Evidence of ground water within 20 inches of the ground surface (poorly drained soil).

(10) Perennial Stream - Permanently inundated surface stream courses. Surface water flows throughout the year except in years of infrequent drought. Perennial streams shall be those shown as solid blue lines on USGS Quad Maps, or streams determined to be perennial by TRPA.

(11) Pond - A standing water body less than 20 acres in size and/or less than two meters deep at low water.

(12) Primary Riparian Vegetation - The following vegetative community types as identified in the 1971 report entitled "Vegetation of the Lake Tahoe Region, A Guide for Planning:"

(a) Type 0: Open water - Open water, Swamps and pools and Vernal pools.

(b) Type 2: Herbaceous - Wet marsh or meadow and Sphagnum bog.

(c) Type 7: Riparian shrub - Willow thicket and Alder thicket.

(d) Type 9: Broadleaf - Low elevations.

(13) SEZ Setbacks - A strip of land adjacent to the edge of a SEZ, the designated width of which is considered the minimum width necessary to protect the integrity of the various characteristic of the SEZ. The width of the setback shall be established in accordance with the procedure set forth in Subsection 37.3.D.

(14) Secondary Riparian Vegetation - The following vegetative types as identified in the 1971 report entitled "Vegetation of the Lake Tahoe Region, A Guide for Planning."

(a) Type 2: Herbaceous - Wet mesic meadow.
(b) Type 9: Broadleaf - High elevations.
(c) Type 19: Lodgepole - Wet type.

(15) Slope Condition - The condition of the slope located adjacent to the stream channel or edge of the SEZ shall be defined as follows. The extent of existing slope protection, which is defined as the percent cover of original duff layer, down logs, low growing vegetation or rock fragments greater than 1-2 inches in diameter, shall be given primary consideration when determining slope condition.

(a) Good - Slopes show little or no evidence of surface (sheet, rill, gully) erosion or mass wasting. Slopes are typically covered 90 percent or more with original duff layer, down logs, slash, low growing vegetation or rock fragments greater than 1-2 inches in diameter. Slope gradient is commonly less than 30 percent. Soil horizons are usually cohesive and consolidated.
(b) Average - Slopes show evidence of surface (sheet, rill,gully) erosion or mass wasting over 5 to 25 percent of the slope surface. Slopes are typically covered between 50 to 90 percent with original duff layer, down logs, slash, low growing vegetation or rock fragments greater than 1-2 inches in diameter. Slope gradient is commonly between 30 and 70 percent.

Soil horizons are typically moderately cohesive and consolidated.

(c) Poor - Slopes show evidence of active and pronounced surface (sheet, rill, gully) erosion or mass wasting over more than 50 percent of the slope surface. Slopes are typically covered less than 50 percent with original duff layer, down logs, slash, low growing vegetation or rock fragments greater than 1-2 inches in diameter. Slope gradient is often greater than 70 percent. Soil horizons are typically non-cohesive and unconsolidated. Evidence of seeping is often present.

(16) Terrace - A moderately flat land area, above the flood plain, generally less than 20 percent slope.

(17) Unconfined - Stream types classified under major categories C (excluding stream type C2), D and E as defined in the report entitled " A Stream Classification System," David L. Rosgen, April 1985.

37.3.B Identification: A stream environment zone (SEZ) shall be determined to be present if any one of the following key indicators is present or, in absence of a key indicator, if any three of the following secondary indicators are present. Plant communities shall be identified in accordance with the definitions and procedures contained in the 1971 report entitled "Vegetation of the Lake Tahoe Region, A Guide for Planning."

(1) Key Indicators: Key indicators are:

(a) Evidence of surface water flow, including perennial, ephemeral and intermittent

streams, but not including rills or man-made channels;
(b) Primary riparian vegetation;
(c) Near surface ground water;
(d) Lakes or ponds;
(e) Beach (Be) soil; or
(f) One of the following alluvial soils:
(i) Elmira loamy coarse sand, wet variant (Ev).
(ii) Marsh (Mh).

(2) Secondary Indicators: Secondary indicators are:

(a) Designated flood plain;
(b) Groundwater between 20 - 40 inches;
(c) Secondary riparian vegetation;
(d) One of the following alluvial soils:
(i) Loamy alluvial land (Lo);
(ii) Celio gravelly loamy coarse sand (Co); or
(iii) Gravelly Alluvial land (Gr).

37.3.C Boundaries: The boundaries of an SEZ shall be the outer most limits of the key indicators; the outermost limits where three secondary indicators coincide; or, if Lo, Co, or Gr soils are present, the outermost limits where two secondary indicators coincide, whichever limits establish the widest SEZ at any particular point. The outermost boundaries of a stream shall be the bank full width of such stream, which shall be defined as the level of frequent high flow, i.e., the level of flood with a recurrence interval of approximately 1.5 years.

37.3.D SEZ Setbacks: No buildings, other structure or land coverage shall be permitted in SEZ setbacks,except in accordance with subsection 20.4.B and the exception for the backshore set forth in Subsection

55.4.D. The restoration requirements set forth in Subparagraph 20.4.A(2)(c) shall not apply within SEZ setbacks. The allowable base land coverage within SEZ setbacks shall be in accordance with Subsection 20.3.A, and may be combined with the allowable base land coverage for the remainder of the parcel to establish a total allowable base land coverage. A portion of the total allowable base land coverage for the parcel may be used to allow construction in the SEZ setback only in accordance with Subsection 20.4.B and the exception for the backshore set forth in Subsection 55.4.D. SEZ setbacks shall be established in accordance with the following criteria (see also Section I of the Technical Appendices).

(1) Confined Perennial Stream: When a confined perennial stream is present, the following setbacks shall be established based on the corresponding slope condition:

(a)Good Slope Condition: When the slope condition is identified as good, the setback shall be 25 feet from the edge of the SEZ or 15 feet from the edge of a terrace, if present, whichever is less.

(b)Average Slope Condition: When the slope condition is identified as average, the setback shall be 35 feet from the edge of the SEZ or 20 feet from the edge of a terrace, if present, whichever is less.

(c)Poor Slope Condition: When the slope condition is identified as poor, the setback shall be 60 feet from the edge of the SEZ or 35 feet from the edge of a terrace, if present, whichever is less.

(2) Unconfined Perennial Stream: When an unconfined perennial stream is present, the setback

shall be 50 feet from the edge of the SEZ.

(3) Confined Ephemeral Or Intermittent Stream: When a confined ephemeral or intermittent stream is present the following setbacks shall be established based on the corresponding slope conditions:

(a) Good Slope Condition: When the slope condition is identified as good, the setback shall be 15 feet from the edge of the SEZ or ten feet from the edge of a terrace, if present, whichever is less.

(b) Average Slope Condition: When the slope condition is identified as average, the setback shall be 25 feet from the edge of the SEZ or 15 feet from the edge of a terrace, if present, whichever is less.

(c) Poor Slope Condition: When the slope condition is identified as poor, the setback shall be 40 feet from the edge of the SEZ or 25 feet from the edge of a terrace, if present, whichever is less.

(4) Unconfined Ephemeral Or Intermittent Stream: When an unconfined ephemeral or intermittent stream is present the setback shall be 25 feet from the edge of the SEZ.

(5) Channel Absent: When there is an SEZ present but there is no associated channel identified, the setback shall be ten feet from the edge of the SEZ.

(6) Lakes and Ponds: Where a lake or pond is present, the SEZ setback shall be 10 feet from the high water line or 10 feet from the edge of the SEZ, whichever is greater, except where a backshore is established in accordance with Section 55.2 in which case there shall be no SEZ setback established.

37.3.E SEZ Documentation: Where the IPES field team identifies the existence of an SEZ on an individual parcel, it shall prepare a permanent written record or drawing applicable to that parcel showing the boundaries of the SEZ, the setback line from the SEZ and setting forth the reasons for its determination. At the time a project is reviewed applicable to a parcel evaluated under IPES as having an SEZ, the SEZ boundaries and setback shall be verified or adjusted based upon additional information then available.

37.4 Area To Be Evaluated: The score received by a parcel shall be based on evaluation of an area established in accordance with the following provisions.

37.4.A Parcels Of 1/3 Acre Or Less: Parcels of 1/3 acre or less in size shall be evaluated in accordance with the following procedures:

(1) Area To Be Evaluated: The evaluation team shall evaluate the entire parcel, except as provided for under Subparagraph (3), below.

(2) Slope Length And Gradient Readings: Slope length and gradient readings shall be taken in accordance with the following procedures:

(a) Segment reading shall be taken perpendicular to the natural contours and through the middle of the most likely building site as determined by the evaluation team in accordance with Section 37.7;

(b) Enough segments shall be recorded for each parcel so that the sum of all segment lengths is equal to approximately 120 feet. In cases where segment lengths totaling 120 feet can not be obtained within a

parcel's boundaries, segment readings shall be taken on adjacent parcels; and

(c) Segment readings shall begin 60 feet above the middle of the most likely building site or at the top of the cut slope or toe of the fill slope adjacent to the public right-of-way or other access road.

(3) Parcels Containing a SEZ: Where a parcel contains an SEZ, the evaluation team shall evaluate only that portion of the parcel located outside the SEZ. The score received by parcels containing less than 5,000 square feet outside an SEZ shall be multiplied by a factor equal to the area outside the SEZ divided by 5,000 square feet. Parcels containing no area outside an SEZ or SEZ setback shall receive a total score of zero.

(4) Parcels Less Than 10,000 Square Feet Or With Less Than 10,000 Square Feet Outside An SEZ: The score received by parcels that are less than 10,000 square feet in size or with less than 10,000 square feet outside an SEZ shall be multiplied by a factor derived from the equation set forth in Section H of the Technical Appendices.

(a) The score received by parcels that contain less than 5,000 square feet outside an SEZ shall be multiplied by the factors established in Subparagraphs (3) and (4), above.

(b) The procedure set forth in Section 37.3 shall be used by the field evaluation teams to establish the area of a parcel outside a SEZ.

37.4.B Parcels Greater Than 1/3 Acre But Less Than Five Acres: Parcels that are greater than 1/3 acre but less than five acres in size shall be evaluated in accordance with the following procedures:

(1) Area To Be Evaluated: The evaluation team shall evaluate an area of approximately 1/3 acre in size that includes the most likely building site as determined by the evaluation team in accordance with Section 37.7. In determining the location of the area to be evaluated, the team shall select the 1/3 acre that results in the highest score.

(2) Slope Length And Gradient Readings: Slope length and gradient readings shall be taken in accordance with Subparagraph 37.4.A(2).

(3) Parcels containing A SEZ: In the case where the best 1/3 acre contains a SEZ the procedures set forth in Subparagraphs 37.4.A(3) and (4) shall be followed.

37.4.C Parcels That Are Five Acres Or Greater: Owners of parcels that are five acres or greater in size shall be contacted by TRPA and asked to identify the location of the 1/3 acre portion of the parcel which includes their desired building site. Once the 1/3 acre portion has been identified, the evaluation team shall evaluate this portion of the parcel to determine the parcel's score. Slope length and gradient readings shall be taken in accordance with Subparagraph 37.4.A(2) and, if the 1/3 acre contains an SEZ, the procedures set forth in Subparagraphs 37.4.A(3) and (4) shall be followed.

37.5 Evaluation Teams: The members of each evaluation team shall be selected by TRPA and shall consist of professionals in the fields of soil science, hydrology and engineering or planning.

37.6 Eligibility Criteria: Parcels shall be determined to be eligible for evaluation, scoring and ranking under IPES in accordance with the following provisions.

37.6.A Vacant Parcels: Vacant parcels that are permitted a single family dwelling as an allowed or special use in accordance with Chapter 18 shall be eligible, provided the parcel is otherwise eligible under Subsection 37.6.C.

37.6.B Parcels That Are Not Vacant: Parcels that are not vacant and do not contain a single family dwelling shall be eligible as though they are vacant upon receipt by TRPA of a written request by the parcel owner that the parcel be evaluated and provided the parcel is otherwise eligible under Subsection 37.6.C.

37.6.C Special Situations: In the following special situations, parcels are ineligible, except as otherwise stated.

(1) Right Of Entry: Parcels for which the owner refuses to grant TRPA the right of entry pursuant to Subsection 37.9.A shall not be eligible, unless the owner subsequently grants TRPA the right of entry.

(2) Building Site Identification: Parcels of five acres or greater in size for which the owner does not identify the desirable building site pursuant to Subsection 37.4.C shall not be eligible, unless the owner subsequently identifies the desirable building site.

(3) Parcels Owned By A Public Or Quasi-Public Entity: Parcels owned by a public or quasi-public entity as defined in the definition of "Public Service" in Chapter 2, including parcels owned by a local, a state or the federal government, or a public utility district shall not

be eligible, unless such public or quasi-public entity requests in writing to TRPA that a parcel be evaluated under IPES and the parcel is otherwise eligible under this section.

(4) Dedicated Open Space: Parcels that are restricted to open space pursuant to a final subdivision map or other recorded document shall not be eligible.

(5) No Physical Access: Except for parcels in planned unit developments, parcels for which there is no road providing physical access to the parcel shall not be eligible, unless TRPA receives a written request from the parcel owner that the parcel be evaluated, the parcel is otherwise eligible under this section, and the parcel owner asserts the existence of an access easement and demonstrates that:

(a) The basic service requirements can be provided in accordance with Chapter 27; and

(b) The corners of the parcel are staked and flagged, if requested by TRPA.

TRPA shall notify parcel owners of determinations made under this subparagraph.

(6) Insufficient Area To Construct A Single Family Dwelling: Parcels that, due to size, configuration, or an easement, may not have a sufficient area to allow construction of a single family dwelling shall not be eligible, unless TRPA receives a written request from the parcel owner that the parcel be evaluated, the parcel is otherwise eligible under this section, and the corners of the parcel are staked and flagged, if requested by TRPA. TRPA shall notify parcel owners of determinations made under this subparagraph.

(7) Local Zoning Restrictions: Parcels that TRPA determines are prohibited residential uses by local government zoning ordinances shall not be eligible, unless TRPA receives a written request from the parcel owner that the parcel be evaluated and the parcel is otherwise eligible under the provisions of this section. TRPA shall notify parcel owners of determinations made under this paragraph. TRPA review pursuant to IPES is not a determination by TRPA that residential uses are permitted by local government.

37.7 Most Likely Building Site: In determining the location of the most likely building site, the evaluation team shall consider: local building setbacks and open space easements, the relationship between the building site and access from public right-of-way, and minimizing excavation and general site disturbance resulting from construction.

37.7.A Reevaluation: Where the IPES field evaluation team has determined a most likely building site in order to undertake its evaluation, it shall make a permanent record of that determination. If at a later time a project proponent selects a site other than the most likely building site, then TRPA shall reevaluate the parcel and adjust the IPES score accordingly. If the reevaluation causes a parcel's score to be reduced below the level defining the top ranked parcels, then the provisions of Subsection 37.8.E shall apply. The cost of reevaluation shall be paid by the project proponent.

37.8 Ranking Of Parcels: Once all eligible parcels within a particular jurisdiction have received a numerical score, the parcels shall be ranked, by jurisdiction, from the most suitable (those parcels receiving the

highest numerical score) to the least suitable (those parcels receiving the lowest numerical score).

37.8.A Deadline For Ranking: Ranking of all eligible parcels shall be completed and considered for adoption by December 31, 1988.

37.8.B Establishment Of Level Defining Top Ranked Parcels: By January 1, 1989, TRPA shall establish an initial numerical level in the ranking immediately above the most sensitive parcels. The initial level shall be at the same numerical value for all jurisdictions. Parcels having scores above the level established herein, and as lowered pursuant to Subsection 37.8.C, shall be the top ranked parcels within each jurisdiction.

(1) Procedure For Establishing Initial Numerical Level: Once all eligible parcels have received a score under IPES and TRPA has taken a final action on requests for reevaluation pursuant to Subsection 37.10.C, the initial numerical level defining the top ranked parcels shall be established by TRPA in accordance with the following procedures. Parcels determined by the IPES field evaluation teams to be located in a soil series not identified in the report entitled "Soil Survey, Tahoe Basin Area, California and Nevada," prepared by the Soil Conservation Service and Forest Service and dated March 1974, shall be excluded from this procedure.

(a) A numerical value shall be established such that the number of vacant residential parcels located above the value equals the number of vacant residential parcels that on March 1, 1988 are shown on TRPA's Land Capability Overlay maps as having

at least 51 percent of their area located in Land Capability Districts 4, 5, 6 and 7.

(b) A zone shall be established between the numerical values that are ten percent greater than and ten percent less than the numerical value established under (a), above.

(c) Based on the soil series and average slope determined by the IPES field evaluation teams, parcels that would otherwise be classified as Land Capability District 3, in accordance with the soil series and slope ranges set forth for Land Capability District 3 lands in the Bailey Report, shall be identified and the arithmetic mean of the scores received by these parcels shall be determined.

(d) Based on the soil series and average slope determined by the IPES field evaluation teams, parcels that would otherwise be classified as Land Capability District 4, in accordance with the soil series and slope ranges set forth for Land Capability District 4 lands in the Bailey Report, shall be identified and the arithmetic mean of the scores received by these parcels shall be determined.

(e) The arithmetic mean of the values established under (c) and (d), above, shall be determined.

(f) If the value established under (e), above, is within the zone established in (b), above, then the initial numerical level shall be set at the value established under (e), above. If the value established under (e), above, is outside the zone established in (b), above, then the initial numerical level shall be set at the numerical value of

the zone boundary that is closest to the value established under (e), above.

37.8.C Lowering Numerical Level Defining Top Ranked Parcels: Provided TRPA makes the findings required under Subparagraph (1) of this Subsection, the numerical level defining the top ranked parcels in any jurisdiction shall be lowered, on an annual basis commencing on January 1, 1990, to include in the top rank a number of parcels equal to the number of parcels in that jurisdiction that used allocations during the previous year in accordance with Chapter 33.

(1) Required Findings: The numerical level defining the top ranked parcels shall not be lowered unless TRPA makes the following findings with respect to the applicable local jurisdiction:

(a) All parcels included in the top rank are otherwise eligible for development under the applicable state water quality management plan for the Lake Tahoe Basin (208 plans) and other legal limitations;
(b) The monitoring program for that jurisdiction is in place pursuant to Chapter 32 and the TRPA monitoring plan.
(c) Demonstrable progress is being made on capital improvement programs for water quality within that jurisdiction;
(d) The level of compliance with conditions of project approvals within any jurisdiction is satisfactory; and
(e) For any jurisdiction, the number of parcels having scores below the level defining the top ranked parcels, divided by the number of parcels in that jurisdiction that were identified as sensitive by TRPA on

January 1, 1986, does not exceed the following percentages;

(i) El Dorado County - 20 percent
(ii) Placer County - 20 percent
(iii) Douglas County - 33 percent
(iv) Washoe County - 33 percent

37.8.D Limitation On Issuance Of Allocations To Parcels Below Level Defining Top Ranked Parcels: In jurisdictions that do not issue building allocations by random selection, the percentage of allocations issued to parcels that were below the line defining the top ranked parcels on January 1, 1989, shall be no greater than the percentage resulting from dividing the number of vacant parcels below the initial line that eventually become located above the line defining the top ranked parcels by the total number of vacant parcels in that jurisdiction.

37.8.E Eligibility To Compete For Allocation: All parcels receiving a score under IPES shall be eligible to compete for residential allocations. Top ranked parcels that receive a residential allocation may pursue issuance of a TRPA permit to construct a new single family house. Parcels with score below the level defining the top ranked parcels may, if in receipt of a residential allocation, exercise any of the options listed below:

(1) Transfer the allocation in accordance with Chapter 34;
(2) Relinquish the allocation; or
(3) Transfer other development rights in accordance with Chapter 34.

37.9 Notification Of Property Owners: Property owners shall be notified as follows:

37.9.A Right Of Entry: TRPA shall not enter a parcel for purposes of evaluation under IPES, if the property owner, has refused to grant the right of entry, and the refusal is in writing, delivered by certified or registered mail, to TRPA or by personal delivery, within the deadline set forth in the notification. Parcels for which the owner refuses right of entry shall be scored zero.

37.9.B IPES Score: Owners of parcels evaluated under IPES shall be notified of IPES scores in accordance with the following provisions:

(1) When eligible parcels evaluated during the 1987 field season, and again, when eligible parcels evaluated during the 1988 field season have been assigned a score, the owner of each such parcel shall be notified by mail, in accordance with TRPA's Rules of Procedures, of the parcel's assigned score, the procedures for requesting a reevaluation in accordance with Subsection 37.10.C and an appeal in accordance with Subsection 37.10.D, and other information determined by TRPA to be necessary.

(2) Once TRPA has taken action on requests for reevaluation in accordance with Subsection 37.10.C and has established the numerical level defining the top ranked parcels in accordance with Subsection 37.8.B and the formula for determining allowable base land coverage in accordance with Section 37.11, the owners of parcels evaluated under IPES shall be notified by mail, in accordance with TRPA's Rules of Procedure, of the parcel's total score, ranking within the appropriate jurisdiction, percentage of allowable base land coverage and the numerical value at which the line identifying the

top ranked parcels is located. This notification shall also identify the score received under each element of IPES and the procedure for filing an appeal.

(3) TRPA shall notify each parcel owner of the score resulting from the procedure established in Subparagraph 37.10.D(1) once TRPA has completed its review of the appeal application. This notification shall include the parcel's total score, ranking within the appropriate jurisdiction, percentage of allowable base land coverage, the score received under each element of IPES and the procedure for requesting that the appeal be heard by the Governing Board.

(4) For purposes of notification under this subsection, the owner of a parcel shall be as shown on the most current county tax assessor rolls.

37.10 Changes In IPES Score: IPES scores may be changed as follows:

37.10.A Installation Of Water Quality Improvement In Vicinity Of Parcel: If water quality improvements of the type considered in Subsection 37.2.G are installed in an area subsequent to TRPA preparing the map in accordance with Subparagraph 37.2.G(1), TRPA shall amend the map by increasing the point value for such area according to the point values identified in Table G-1 for the improvements installed. The scores received by parcels located in areas where point values are increased in accordance with this subsection shall be increased to reflect the new point value.

37.10.B Changes In Condition Of Watershed: if the TRPA finds that the estimated overall ability of a drainage basin to deliver nutrients and sediments to Lake Tahoe has changed, based on consideration of the three categories listed in Subsection 37.2.E, the point value given that watershed shall be changed to reflect the new condition and the score received by parcels located in that watershed shall be changed accordingly. Such changes in the condition of a watershed may cause the score received by a parcel to increase or decrease.

37.10.C Reevaluation Procedure: The owner of a parcel receiving a score under IPES may request a reevaluation based on the submittal of information that was not known to, or considered by, the evaluation team at the time the evaluation was performed, such as existing access easements and lot consolidations. Reevaluation shall not include a determination with respect to the IPES criteria being properly applied. That determination is included under an appeal. To be eligible for reevaluation, a complete application requesting reevaluation shall be filed with TRPA within 30 working days from the date the notification, in accordance with Subparagraph 37.9.B(1), is given pursuant to TRPA's Rules of Procedure. This procedure shall not apply where a building site other than the most likely building site is selected by a project proponent pursuant to Subsection 37.7.A.

37.10.D Appeal Procedure: The owner of a parcel who has received notification of the parcel's score under IPES may file an appeal with TRPA by notifying TRPA of the intent to appeal. Such notification shall be in writing and shall be filed with TRPA no later than 45 working days from the date notification, in accordance with Subparagraph 37.9.B(2), is

given pursuant to TRPA's Rules of Procedure. Complete applications for appeals shall be filed with TRPA within 134 working days from the date notification, in accordance with Subparagraph 37.9.B(2), is given pursuant to TRPA's Rules of Procedure. Complete applications shall include, at a minimum, identification of the IPES criteria the parcel owner feels was improperly or incorrectly applied and any data, reports,or other information in support of the appeal.

(1) Upon receipt of an appeal, the parcel shall be reevaluated by an evaluation team other than the one that performed the original evaluation. A second notification, pursuant to TRPA's Rules of Procedure and in accordance with Subparagraph 37.9.B(3), shall be given to the parcel owner. The determinations of the second evaluation team shall be final, unless the owner of the parcel requests in writing to the Executive Director that the appeal be heard by the Governing Board. The written request must be received by TRPA within 15 working days from the date that the second notification was given pursuant to TRPA's Rules of Procedure.

(2) Appeals to the Governing Board shall be processed in accordance with TRPA's Rules of Procedure. The Governing Board may change the score for a parcel only if it finds that the IPES criteria were not applied correctly and then the score shall be changed only to the degree resulting from proper application of the criteria.

37.10.E Reversal Of Denial Of Entry: an owner of a parcel for which right of entry was denied, may request in writing, by certified or registered mail or by personal delivery, the scoring and ranking of the parcel. The owner shall bear the cost of the field team evaluation. Upon receipt of the score in accordance with Subsection 37.9.B, the parcel owner may request reevaluation or an appeal in accordance with Subsection 37.10.C and 37.10.D.

37.11 Allowable Base Land Coverage: The allowable base land coverage for residential parcels evaluated under IPES shall be a function of the parcel's combined score under the IPES criteria for relative erosion hazard and runoff potential as correlated with the coverage coefficients and land capability districts of the Bailey Report. The allowable base land coverage under IPES shall be established in accordance with the following procedures and shall be considered for adoption by TRPA no later than January 1, 1989.

37.11.A Procedure For Establishing Allowable Base Land Coverage: Once eligible parcels have received a score under IPES, and TRPA has taken action on requests for reevaluation pursuant to subsection 37.10.C, the percentage of allowable base land coverage shall be established by TRPA in accordance with the following procedures:

(a) Based on the soil series and average slope determined by the IPES evaluation teams, all parcels preceiving a score under IPES shall be identified as to which of the seven capability classes established in the Bailey Report each parcel would have been classified. Parcels determined by the IPES evaluation teams to be located in a soil series not identified in the

report entitled "Soil Survey, Tahoe Basin Area, California and Nevada," prepared by the Soil Conservation Service and Forest Service and dated March 1974, shall be excluded from this procedure.

(b) The combined scores for Relative Erosion hazard and Runoff Potential representing the central tendency within each capability class shall be determined. The central tendency shall be described by determining the mode value, or by alternative statistical methods, including mean or median values, whichever is appropriate.

(c) The central tendency scores established in (b), above, shall be plotted, in graph form, against percentages of allowable base land coverage ranging from one percent to thirty percent. The central tendency score for Land Capability Districts 1a, 1c, and 2, shall be plotted at one percent; for Land Capability District 3 at five percent; for Land Capability District 4 at 20 percent; for Land Capability District 5 at 25 percent; and for Land Capability Districts 6 and 7 at 30 percent. If the central tendency scores of any of the capability classes set forth in (c), above, are determined to be statistically indistinguishable, such classes shall be combined for purposes of establishing a central tendency score. If capability classes are combined, the central tendency score shall be plotted at the percentage that is the average of the percentages established for those classes in Subsection 20.3A of the TRPA Code.

(d) TRPA shall develop a formula for a line passing through the points of central tendency plotted in accordance with (c), above. No parcel shall be allowed more than 30 percent, or less than one percent base land coverage.

(e) Allowable base land coverage for parcels receiving a score under IPES shall be established in accordance with the formula developed in (d), above.

37.11.B Application Of Allowable Base Land Coverage Percentages: The percentages of allowable base land coverage established in accordance with Section 37.11 shall be applied as follows to determine the total allowable base land coverage:

(1) Parcels of 1/3 Acre Or Less In Size: The percentage of allowable base land coverage shall be applied to the entire parcel area, except in cases where the parcel contains areas classified as SEZ or backshore. In such cases, the percentage of allowable base land coverage shall be applied to only that area outside the SEZ and backshore. The allowable base land coverage of one percent in the SEZ and backshore may be combined with the allowable base land coverage for the remainder of the parcel to establish a total allowable base land coverage for the parcel. A portion of the total allowable base land coverage for the parcel may be used to allow construction of access only through the SEZ, provided TRPA makes the findings required in Subparagraph 20.4.B(1), and through the backshore, provided TRPA makes the findings required in Section 55.4.

(2) Parcels Greater Than 1/3 Acre But Less Than 5 Acres In Size: The percentage of allowable base land coverage shall be applied to the 1/3 acre evaluated by the evaluation team. If the owner of the parcel is able to identify a larger and contiguous area that has the same characteristics as the 1/3 acre originally evaluated and TRPA concurs, the percentage of allowable

base land coverage shall be applied to the larger area. Allowable base land coverage on parcels that contain a SEZ shall be calculated in accordance with Subparagraph (1) above.

(3) Parcels Of Five Acres Or Greater In Size: The percentage of allowable base land coverage shall be applied to all that portion of the parcel that the evaluation team identifies as having the same characteristics as and being contiguous to the area evaluated.

[List of Amended Sections]

Amended Subsection	Date Amended
37.2.H(1)	10/29/87
37.3.C	6/28/89
37.3.D	3/23/88
37.4.A	3/23/88
37.6.	3/23/88
37.6.C	3/23/88
37.8.B(1)	3/23/88
37.9.B	3/23/88
37.10.D	12/21/88
37.10.D	3/23/88
37.11	3/23/88
37.11.A	10/27/88

UPPAWAY
LEGEND
PHASE 1
PHASE 2
PHASE 3
LAKE TAHOE
EXISTING CARETAKERS HOUSE
AUTO PARK
TENNIS COURT
EXISTING GUEST HOUSE
EXISTING BALCONIES
EXISTING MAIN HOUSE
COMMUNITY AREA

Supreme Court, U.S.

No. 93-548

In The

Supreme Court of the United States

October Term, 1993

WILLIAM CODY KELLY, Trustee,

Petitioner,

vs.

THE STATE OF CALIFORNIA,
THE STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider a Fifth Amendment takings decision, reached after nearly five weeks of trial and unanimously affirmed by the Nevada Supreme Court, emanating from the unique regulations of the Tahoe Regional Planning Agency governing environmental protection in the complex ecosystem of the Lake Tahoe Basin, where those regulations, as applied to six hilltop lots owned by Petitioner William Cody Kelly, permit residential use as reflected by the lots' conceded, undiminished market value of between $2,000,000 and $4,000,000?

2. Did William Cody Kelly suffer denial of economically viable use of those lots, where they originally were part of an undivided, 44-acre parcel acquired by him for $500,000 and upon which rested the Fleischmann Mansion, the object of his desire for the land, where Kelly lived in the mansion 18 years, later selling it for $1,100,000, and divided the remainder of the parcel into 39 executive, residential lots, sales of which, *excluding* those at issue but including the mansion, have produced approximately $5,600,000?

3. Should this Court grant certiorari to review a ruling by the Nevada trial court, affirmed without comment by the Nevada Supreme Court, that the Tahoe Regional Planning Compact preempts Article 1, Section 8, of the Nevada Constitution, the takings proscription, where Kelly failed before the Nevada Supreme Court – as he fails before this Court – to demonstrate how this case would have been decided differently under the Nevada

QUESTIONS PRESENTED – Continued

Constitution, as opposed to the Fifth Amendment to the United States Constitution, and where decisions of the Nevada Supreme Court regularly intermix discussions of the state and federal Takings Clauses?

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The following abbreviations are employed in this brief:

1.	**App.**	– Appendix to Kelly's Petition for Writ of Certiorari
2.	**Ex.**	– Exhibit in Evidence Before The Trial Court
3.	**Hilltop Lots**	– Lots 33, 34, 35, 36, 37 & 38 of Uppaway Estates
4.	**IPES**	– TRPA's Individual Parcel Evaluation System
5.	**Kelly**	– Petitioner William Cody Kelly, Trustee
6.	**Pet.**	– Kelly's Petition for Writ of Certiorari
7.	**R.**	– Record on Appeal Before The Nevada Supreme Court
8.	**TRPA**	– Respondent Tahoe Regional Planning Agency
9.	**Uppaway**	– Uppaway Estates, Kelly's Planned Unit Development
10.	**1969 Compact**	– Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969); Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200

TABLE OF ABBREVIATIONS – Continued

11.	**1980 Compact** –	Tahoe Regional Planning Compact, as amended, Pub. L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200
12.	**1984 Plan** –	The TRPA Regional Plan, adopted April 26, 1984
13.	**1987 Plan** –	The TRPA Regional Plan, adopted June 25, 1987

No. 93-548

In The

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October Term, 1993

WILLIAM CODY KELLY, Trustee,

Petitioner,

vs.

THE STATE OF CALIFORNIA,
THE STATE OF NEVADA,
TAHOE REGIONAL PLANNING AGENCY,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

BRIEF IN OPPOSITION OF RESPONDENT TAHOE REGIONAL PLANNING AGENCY

The Tahoe Regional Planning Agency (TRPA), Respondent, respectfully submits this brief in opposition to the Petition for Writ of Certiorari to The Supreme Court of The State of Nevada, dated October 5, 1993, filed herein by Petitioner William Cody Kelly, Trustee (Kelly), which petition was received by Respondent on October 6, 1993.

I

STATEMENT OF THE CASE[1]

A. NATURE OF THE CASE

This case involves the environmentally fragile enclave in the Lake Tahoe Basin and the special approach there to land use regulation. It focuses upon the effort by TRPA,[2] an entity created by interstate compact, to stem continuing, precipitous decline of Lake Tahoe's once-pristine water quality and environs. The action concerns application of TRPA's 1987 regulations to six sensitive Hilltop Lots situated in Uppaway, a nearly-built-out, upscale subdivision developed by Kelly on the shore of the lake near Glenbrook, Nevada.

While Kelly challenged TRPA's 1987 Plan, including its IPES program, as in violation of Fifth and Fourteenth Amendment takings and due process proscriptions, the Nevada trial court in a 128-page decision – reached after

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[1] That we have not described the decisions below does not mean we concur in Kelly's description of them. *See* Pet. at 6-9. Indeed, he distorts the rulings by discursively isolating bits and pieces out of context. And while we shall deal with his mischaracterizations in the text below, the essence of the rulings is apparent both from this Statement of The Case and a brief perusal of portions of the appendices to the petition. App. A 1-20; App. D 2-23. We are also mindful of the admonition that a brief in opposition "shall be as short as possible. . . . " Sup. Ct. R. 15.3. The abundance and complexity of the facts of this case, however, coupled with Kelly's mis-descriptions of them, necessitated a lengthy Statement of The Case.

[2] Terms represented by abbreviations such as "TRPA", "Hilltop Lots", "Uppaway", "IPES" and others frequently used in this brief are referred to in the Table of Abbreviations immediately preceding the title page.

nearly five weeks of trial, testimony of numerous lay and expert witnesses and a surfeit of documentary evidence – sustained the measure: it neither lacked scientific underpinning nor deprived Kelly of economically viable use of the Hilltop Lots. The Nevada Supreme Court unanimously affirmed.

B. THE LAKE TAHOE BASIN

The Lake Tahoe Basin rests over 6,000 feet above sea level in the Sierra Nevada, occupying 324 square miles astride the Nevada-California border. Lake Tahoe, the focal point of the basin, is surrounded by magnificent mountain peaks, some almost a mile higher than the surface of the lake. Descending abruptly from the peaks and ridges to the lake's edge, the lands within the basin are quite steep, with about three-quarters of the area comprising slopes in excess of 30 percent. Ex. C-5, p. 7.[3]

The tenth deepest in the world, Lake Tahoe is "ultra-oligotrophic", characterizing a lake extremely clear and having few nutrients otherwise supporting growth of algae. Until recently, the lake had a 10,000-year history of

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[3] The basin's resplendent beauty, coupled with proximity to California's population centers, has marked it the quintessential retreat. But in the prescient words of the California Supreme Court, "there is good reason to fear that the region's natural wealth contains the virus of its ultimate impoverishment." *People ex rel. Younger v. County of El Dorado*, 96 Cal. Rptr. 553, 487 P.2d 1193, 1195 (Cal. 1971).

being at or near equilibrium in the gain and loss of nutrients. *Id.* at 8-9; App. A 2.[4]

Once disturbed, soil in the Lake Tahoe Basin is unable to function as a medium for growth of vegetation and storage of nutrients. Disturbance also causes increased sediment loads to Lake Tahoe, in turn resulting in storage of nutrients in the lake, rather than in the watersheds where they belong. *See* Ex. E-11 c., p. 30; App. A 2.[5]

Lake Tahoe is experiencing a downward trend in water quality. Because of increased sediment, there has been a decline in annual average depth of visibility from 31.2 meters in 1968 to 27.6 meters in 1981 and a drop in winter clarity from an average 33.6 meters in 1968 to 14.9 meters in 1981. There has been a corresponding 110 percent surge in algae from 1959 to 1980. Ex. C-5, p. 12. Lake

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[4] Dr. Charles R. Goldman, the eminent limnologist from the University of California at Davis, and perhaps the scientist most familiar with Lake Tahoe, testified that the lake retains its water for approximately 700 years. That is a result of its enormous volume, 156 cubic kilometers, very small watershed, single outfall and limited inflows. 47 R. 1007-1008. Hence, water flowing into the lake is going to be there a long time, so that accompanying nutrients tend to accumulate and promote increasing algal growth. *Id.* at 1009; *see generally* App. D 9 & 12-16.

[5] The recent annual suspended sediment load to Lake Tahoe from surface runoff is approximately 27,000 metric tons, about *four* times the natural load. Isolated examples of development have revealed suspended sediment concentrations 100 to 1,000 times the natural. These elevated amounts of sediments, accompanied by nutrients, cause an increase in algal productivity and a decline in the clarity of the lake. Ex. E-11 c., p. 31.

Tahoe is losing transparency at nearly a half meter *per year*. 47 R. 1015; App. A 3 & D 10.

Residential development at Lake Tahoe boomed in the years surrounding enactment of the 1969 and 1980 Compacts (*post*). *See generally* 54 R. 2040-2050. At the height of planning activities under the 1980 Compact, there were about 19,000 to 20,000 vacant lots in the Tahoe Basin. *Id.* at 2082. In 1989, the year TRPA's IPES system was implemented, there were approximately 12,000 vacant lots remaining. *See* 54 R. 2082.[6]

C. KELLY'S ACQUISITION OF THE 44-ACRE PARCEL

Aware of possible creation of an interstate agency to address environmental problems at Lake Tahoe (35 R. 522-523), Kelly in 1966 acquired the single, 44-acre parcel that was to become Uppaway. *Id.* at 493-494; App. D 2. He paid $500,000 cash for the land. 35 R. 494. The Fleischmann Mansion, a 7,500-square-foot home, existed on the parcel and was an object of Kelly's desire for a residence before the purchase. *Id.* at 494-495. The property also contained a caretaker's residence and guest house. *Id.* at 496-497. Kelly had retained a consultant to assure himself that, when spending $500,000 for a residence, he would be able to recoup his investment through subdivision development. *Id.* at 503-505. In short, he wanted to be sure of regaining his $500,000 by selling the

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[6] A decline in lots after 1983 was the result primarily of federal and state land-purchase programs. 54 R. 2082.

residence and enough land to produce that amount. *Id.* at 505; App. D 2.

Kelly lived in the mansion from 1966 through 1984. 35 R. 496; App. D 2. He later sold it for $1,100,000 (35 R. 543; App. D 4), but continued to maintain a residence in the guest house. 36 R. 582-583.

D. THE 1969 TAHOE REGIONAL PLANNING COMPACT

Following decades of efforts to grapple with development pressures and environmental deterioration at Lake Tahoe (*see generally* 48 R. 1152-1160), capped by the Report of the Lake Tahoe Joint Study Committee in the mid-1960's (Ex. 26), the States of California and Nevada enacted the 1969 Compact. Pub.L. 91-148, 83 Stat. 360; Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200. Establishing an agency described as the "*sui generis* [offspring] of a marriage between sovereign partners", *People of St. of Cal. ex rel. Younger v. Tahoe Reg. P. Ag.*, 516 F.2d 215, 218 (9th Cir. 1975), *cert. denied*, 423 U.S. 868 (1975), the 1969 Compact mandated TRPA's adoption of a regional plan of resource conservation and orderly development. 1969 Compact, Art. I(c); App. D 3.

Due to structural defects[7] in the accord, including the synergistic confluence of Article III(g)'s voting procedure

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[7] A number of the deficiencies in the 1969 Compact are treated in 3 K. Manaster and D. Selmi, *California Environmental Law and Land Use Practice*, § 64.04(6) (1990). While early federal and state efforts to revise the faulty compact failed, continuing discussions ultimately resulted in the 1980 Compact (*post*), under which TRPA's current regulations were adopted. *See generally* 48 R. 1177-1189.

and Article VI(k)'s allowance of major projects to be "deemed approved" absent a vote constituting "action" (App. A 4), there arose acute concerns over TRPA's ability to address the problems besetting Lake Tahoe. 48 R. 1177-1180; *see* App. D 3.

E. THE CREATION OF UPPAWAY ESTATES

Uppaway was a 39-lot planned unit development, of which Lots 33 through 39, the Hilltop Lots, comprised Phase III. The project was described by Kelly as a "*sited* parcel land sale program." Ex. 39, p. 26 (emphasis in original). Most of Uppaway was located in a TRPA land capability district allowing one percent land coverage. 46 R. 817-818.[8] Kelly received a variance, however, for approximately seven percent land coverage in the one percent area. Ex. 39, p. 23. Uppaway was "deemed approved" by TRPA under the 1969 Compact, even though it received seven negative votes and only two affirmative ones by TRPA board members. Ex. 1, p. 2; App. D 3-4. The project's "deemed-approved" status was confirmed by an unpublished federal court order in *Tahoe*

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[8] TRPA employs a scientific system of "land capability" classification, allocating maximum amounts of impervious surface depending upon, *inter alia*, the erosion and runoff potential of soils and the steepness of slopes on which they rest. The method was devised by Dr. Robert G. Bailey, a geomorphologist, and is articulated in his report, *Land-Capability Classification of The Lake Tahoe Basin, California-Nevada: A Guide For Planning*, Robert G. Bailey (1974). Ex. 2-6.

Regional Planning Agency v. Douglas County, et al., No. R-75-130 (D. Nev., Oct. 24, 1975).[9]

While immediately building infrastructure and commencing sales of lots in Phases I and II, Kelly did not start even off-site improvements, such as the road, for the Hilltop Lots (Phase III) until 1982. He first wanted to see how sales of lots in Phases I and II proceeded. 35 R. 626. The hilltop improvements were not completed until 1983. Ex. 1-41; App. A 7 & D 8.[10]

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[9] What was deemed approved was a 39-lot subdivision and land coverage variance. Kelly himself described Uppaway as a "*sited* parcel *land sale* program." Ex. 39, p. 26 (emphasis of "land sale" added). The approval, therefore, was of building sites only, not homes. TRPA has never questioned the validity of Uppaway's creation; nor has the Nevada Supreme Court. Contrary to Kelly's representation (Pet. at 8 n. 10), the Nevada high court affirmed the project's lawful existence and substantial coverage variance. App. A 19. *When* the lots would be built upon, however, the focus of IPES (*post*), was correctly determined by the Nevada tribunal as beyond the ambit of Uppaway's approval and the federal court order confirming it. *Id.* at 18-19.

[10] These undisputed facts betray repeated misstatements by Kelly that he has been delayed development "for 19 years". Pet. 4, 6, 10 & 25. Having not even readied the Hilltop Lots for residential construction until 1983, that simply is *not* the case. Moreover, due to a federal court injunction lasting from 1984 through mid-1987 (*post*), TRPA was legally unable to approve homes on the hilltop once it was improved. The petition's implications of privation are also belied by Kelly's sales, as of July 1989, of 24 lots in Phases I and II for the total sum of $5,236,000. 47 R. 938; Ex. ZD.

F. IMPLEMENTATION OF THE 1980, AMENDED TAHOE REGIONAL PLANNING COMPACT

1. The 1980 Compact. Due to the failure of the 1969 Compact to cope with mounting degradation of the Lake Tahoe Basin, the states, with Congress' approval, extensively amended the accord in December, 1980. Pub.L. 96-551, 94 Stat. 3233 (1980); Cal. Gov. Code §§ 66800 & 66801; NRS 277.190 & 277.200.[11] In terms far more exigent than its predecessor, the 1980 Compact accentuated growing threats to the ecology of the region and declared the need to establish "environmental threshold carrying capacities,"[12] along with a plan achieving them while providing orderly growth. 1980 Compact, Art. I(a); App. D 5. It made a number of significant changes to the 1969 Compact, including stricter project-review standards. App. A 5 n. 4.

The 1980 Compact required TRPA to adopt the environmental threshold standards within 18 months after December, 1980 (1980 Compact, Art. V[b]), and amend its regional plan to achieve and maintain them within one year after that. *Id.*, Art. V(c). The compact also mandated

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[11] The background of the 1980-amendments to the Compact and the planning process they spawned are treated in *People of California v. Tahoe Regional Plan Agency*, 766 F.2d 1308, 1310-1312 (9th Cir. 1985).

[12] "Environmental threshold carrying capacities", defined in Article II(i) of the 1980 Compact, were performance standards for maintenance of components of the Tahoe Basin's ecosystem. They included, among others, bench marks for air and water quality, soil conservation and vegetation preservation. The standards were adopted in August, 1982. App. D 6.

that all projects be directly, versus "deemed", approved by the agency. *Id.*, Art. VI(b).[13]

2. Ordinance 81-5. As a first step toward implementing the 1980 Compact, TRPA in June, 1981, enacted Ordinance 81-5, representing a coalescence of TRPA's responsibilities both as an area-wide planning agency under Section 208 of the Federal Clean Water Act (33 U.S.C. § 1251 *et seq.*) and to insure the amended plan required by the compact would not be outstripped by precipitate development of high-hazard lands. Ex. 32, §§ 1.10, 1.20 & 1.30. Public hearings had indicated that, absent quick action, serious degradation in water quality "may irreversibly damage Lake Tahoe and the Lake Tahoe region." *Id.*, § 1.40. In response, Ordinance 81-5 established a discretionary, "case-by-case" permit system for residential development on the most environmentally sensitive land capability districts, including District 1 comprising the Hilltop Lots. *Id.*, § 2.00; App A 5 n. 4. The process was designed to give TRPA a measure of breathing room in its attempt to solve the conundrum of thousands of single-family lots on sensitive lands and pressing demands to develop them. (During early efforts to implement the 1980 Compact, there were 19,000-20,000 vacant lots in the Tahoe Basin. 54 R. 2082.)

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[13] TRPA was required to define by ordinance which activities were not "projects" and thus exempt from TRPA approval. 1980 Compact, Art. VI(a). In February, 1981, TRPA adopted Ordinance 81-1 for that purpose. Ex. 31. Contrary to Kelly's assertion (Pet. at 4), Ordinance 81-1 did *not* apply "exclusively" to Uppaway: it was a basin-wide measure. Indeed, as the trial court found, Ordinance 81-1 was evenly applied and did not deny Kelly equal protection of the laws. App. D 20.

Shortly after adoption of Ordinance 81-5, Uppaway Development Company, Kelly's corporation, applied to TRPA for approval of a residence on one of the Hilltop Lots. TRPA advised Kelly, however, that to be eligible under Ordinance 81-5, off-site improvements for the lot, such as roads and drainage structures, were required to be in place. *See* Ex. 1-7; Ex. 32, §§ 12.11 & 12.21; App. A 5-6. In early 1982 Kelly again was told by the agency of the need for those improvements as a prerequisite for residential development. *See* Ex. 1-11.

In July, 1982, TRPA approved Kelly's plans for hilltop off-site improvements as in accordance with the subdivision map "deemed approved" under the 1969 Compact.[14] 34 R. 236-237; Ex. A-17. Shortly after approval of the plans, Kelly filed applications under Ordinance 81-5 for single-family residences on the Hilltop Lots. Ex.'s 25 through 29. Kelly agreed to proceed under Ordinance 81-5 (34 R. 239) and hence was to follow the normal, *discretionary* case-by-case review procedure before building permits could be approved. *See* App. D 7. While this occurred in mid-1982, the improvements for the Hilltop Lots, as we have noted, were not completed until October, 1983. *See* Ex. 1-41; App. D 8.

Hundreds of applications similar to Mr. Kelly's were pending before TRPA at the time. App. B 6-7. Moreover, as

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[14] TRPA's approval of the improvement plans was necessary because Kelly, along with changes to lot configurations on the hilltop, had proposed constructing a road to access the area instead of the cable railway envisioned by the subdivision map deemed approved. *See* Ex. 1-20.

the trial court observed, TRPA was faced with the "difficult and time-consuming task of implementing the novel and complex planning approach of the 1980 Compact, including its pressing deadlines for the adoption of environmental threshold carrying capacities and a new plan and ordinances attaining and maintaining them. . . ." App. D 35. Added to that task was "resolving the dilemma of what to do about the 17,000, more or less, preexisting single-family lots, of which Mr. Kelly's holdings were a portion." *Id.*[15]

Although Kelly's applications under Ordinance 81-5 became eligible for approval in 1983 (Ex. A-29), TRPA on August 26, 1983, temporarily suspended issuance of permits, pending adoption of the new regional plan required by the 1980 Compact. Ex. A-32, p. 3. TRPA counsel had advised the agency it no longer could approve projects because the new plan prescribed by the compact was overdue (*id.* at 1; App. D 8): Article V(c) had required the plan be enacted within *one year* after adoption of the environmental thresholds. The latter were approved

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[15] Kelly portrays TRPA's treatment of him in the early 1980's as a parade of horrors. *See* Pet. at 4. The trial court, however, repeatedly found TRPA's actions to be fair and reasonable. *See, e.g.*, App. D 20 (Kelly failed to prove TRPA's conduct was the product of inaction or discrimination toward him); *Id.* (no evidence of fraud or malice on the part of TRPA); App. D 35 (no evidence of intentional neglect or malice over the winter months of 1983-1984); App. D 36 (despite delays, actions of TRPA were reasonable and justified under all the circumstances).

August 26, 1982, the one-year deadline thus expiring August 26, 1983.[16]

3. The 1984 Plan. On April 26, 1984, TRPA adopted an amended plan representing its first, albeit unsuccessful attempt to comply with the mandates of the 1980 Compact. *See* Ex. A-35; App. D 8. The ordinance enacting the plan permitted continued, discretionary issuance of permits for then-pending applications under Ordinance 81-5. Ex. A-35, p. 14. As a result, Kelly's Hilltop-Lot applications would have been processed under Ordinance 81-5, as opposed to the new rules prescribed by the 1984 Plan. 34 R. 249-250; App. D 8.

Culminating a historic planning process of dimensions not even the framers of the 1980 Compact could have foreseen (Ex. A-35, § 1.25; *see People of California v. Tahoe Regional Plan Agency*, 766 F.2d at 1311-1312), the 1984 Plan attempted to balance acute pressures for development with consumption of scant remaining resources in a manner TRPA felt – *incorrectly* – was in compliance with the environmental thresholds. On April 26, 1984, the very day TRPA adopted the plan, the State of California and League to Save Lake Tahoe sued TRPA, alleging the plan violated the 1980 Compact. *People of California v. Tahoe Regional Planning Agency*, No. CIV-S-84-0561-EJG, United States District Court, Eastern District of California (1984). App. D 8. TRPA's approval of projects under the disputed plan was immediately halted by a temporary

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[16] The trial court determined TRPA's suspension of permits "was done in good faith for a significant public purpose and was reasonable in duration given the complexity of the tasks undertaken." App. D 22.

restraining order (34 R. 250-251), followed by a preliminary injunction on August 9, 1984. App. D 8-9. The preliminary injunction was affirmed on appeal. *People of California v. Tahoe Regional Plan Agency*, 766 F.2d 1308.

The 1984 Plan thus never took effect. *Tahoe-Sierra Preservation v. Tahoe Reg. Planning*, 938 F.2d 153, 155 (9th Cir. 1991). Because of the injunction, TRPA was unable to act upon projects, including residences on the Hilltop Lots, until after adoption of the 1987 Plan settling the litigation. *See* 34 R. 251; App D 9.

4. The 1987 Plan. Following its unsuccessful appeal to the Ninth Circuit, and while still under preliminary injunction, TRPA instituted a "Consensus Building Workshop" to obtain the broadest possible range of private and governmental viewpoints on the makeup of a new regional plan. As a result of the negotiations, tentative agreements on various elements of a plan began to emerge in late 1986. App. B 7; *see generally* Exs. Z & D-9. On June 25, 1987, TRPA adopted the 1987 Plan, the product of the consensus discussions. Ex. F-18. That action settled the 1984 Plan lawsuit, which was dismissed July 15, 1987.

The 1987 Plan, presently in effect, is designed to attain and maintain the environmental threshold carrying capacities while allowing orderly development. It contains elements addressing land use, recreation, conservation, public facilities and implementation. 51 R. 1591-1592. The plan also incorporates "planning area statements" for 175 planning areas in the Lake Tahoe Basin. Akin to zoning maps, the statements prescribe density and permissible uses. 51 R. 1592-1593. Planning

Area Statement No. 059, applicable to Uppaway, *permits* single-family residential development at a density of one unit per acre. 51 R. 1636; Ex. I-2.

The keystone of the 1987 Plan, in terms of residential development, is IPES, a scientifically-based system for gradual build-out of all vacant residential lots in the Lake Tahoe Basin, excluding those in stream zones (inapplicable here). IPES is designed to direct construction initially to those areas most suitable for it in accordance with environmental thresholds. Ex. I-1, p. VII:3; App. A 8.

When IPES was under consideration by the Consensus Building Workshop there were approximately 18,000 vacant residential parcels (52 R. 1738); and demand to use them far exceeded the basin's ability to accommodate the development. With uncontrolled building portending permanent loss of Lake Tahoe to eutrophication, a priority system, such as IPES, was needed to allow the most suitable, in terms of protecting the lake's water quality, to be built upon first. 48 R. 1212; App. D 10.

As of December 31, 1988, all vacant residential parcels in the basin, approximately 12,000 by that time (*see* 52 R. 1746), had been evaluated by "IPES teams" consisting of a soil scientist, hydrologist and an engineer or land use planner. Ex. I-3, § 37.5; App. A 8; App. D 11. Applying set criteria, including "relative erosion hazard" and "runoff potential," the teams determined scores for all lots. Ex. I-3, § 37.2; 52 R. 1747-1783. Having assembled the scores, the TRPA Governing Board statistically established 725 as

the "IPES line", with parcels scoring above it eligible to receive building permits. 51 R. 1625; App. A 8; App D 11.

Due to the injunction against the 1984 Plan and adoption of the 1987 version, Kelly was required to have the Hilltop Lots evaluated under IPES. App. D 10-11.[17] When that occurred, one of the six was given a passing score of 758. Ex. 2-2; 28 R. 8295. That lot immediately became eligible to receive a development allocation and building permit. 28 R. 8295. Prior to trial, Kelly had appealed the remaining IPES scores as allowed by TRPA regulations. 28 R. 8295. As a result, a second of the six lots received a passing score. 28 R. 8295; Ex. YYY.[18]

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[17] Kelly asserts – understandably *without* citation to the record – that there was a "concession at trial" that the 1975 court order confirming Uppaway's "deemed-approved" status "took the [Hilltop Lots] out of the strictures imposed by IPES." Pet. at 5 n. 4. There was, to be sure, *no* such TRPA capitulation at trial or elsewhere. Indeed, the trial court's erroneous exemption of the lots from IPES (App. B 100) directly led to TRPA's successful cross-appeal. The Nevada Supreme Court ruled that Kelly, although having approved lots and land coverage, nonetheless was subject to IPES' principal attribute of directing timing of construction. App. A 17-19.

[18] The post-appeal IPES scores for the four non-passing lots were 693, 694, 702 and 725. App. D 11. The scores were sufficiently near the 725-level to make Kelly eligible in 1990 to purchase IPES points, as permitted by Section 37.2 I, including Appendix J, of Chapter 37 of the TRPA Code of Ordinances. Ex. I-3. (The money paid would be deposited into a TRPA fund earmarked for water-quality improvement projects.) At $672 per point, the sum presently assessed (*id.*), Kelly could cause *all* of his lots to pass the IPES line by spending $60,480.

The numerical level defining top-ranked parcels under IPES, initially set at 725, may be lowered in any local jurisdiction on an annual basis. Ex. I-3, § 37.8.C. Lowering of the line is dependent upon findings by TRPA, *inter alia*, that progress is being made in the jurisdiction on capital improvements for water quality. *Id.*, § 37.8.C(1). It will take approximately two to three years for the IPES line to reach Kelly's Hilltop Lot with the lowest IPES appeal score. 53 R. 1881-1883.[19]

G. THE ECONOMIC IMPACT OF TRPA'S REGULATIONS

The trial court found the Hilltop Lots maintained current, substantial values under the 1987 Plan and that the plan, including IPES, did not deny Kelly their economically viable use. App. D 18 & 21. Kelly's own expert appraiser testified that the lots – in the presence of IPES –

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[19] Kelly harps of a TRPA "concession" that he may never be allowed to build residences on the Hilltop Lots. Pet. at 6 & 9 n. 11. He disingenuously cites as "evidence" minutes of a *post*-trial TRPA meeting (Pet. at 9 n. 11), which were *stricken* by the Nevada Supreme Court because they were not part of the record on appeal. App. A 20 n. 18. Kelly fails, moreover, to acknowledge that two of the six lots already have passed IPES. App. A 13. And he ignores TRPA's expert's opinion on movement of the IPES line (53 R. 1881-1883), the scholarliness of which convinced the trial court and the Nevada Supreme Court. App. B 67; *see* App. A 15-16. Indeed, as the trial court observed, "Mr. Ziegler and others testified that in the next several years the 725 point cut-off line is likely to move downward. The line needs to be lowered by only 33 or less points to make all four remaining lots eligible." App. B 75. Furthermore, Kelly's position is undermined by his ability to purchase IPES points. Fn. 18, *ante*.

were worth $2,025,000. App. B 45-46; *see* Ex. ZY, p. 16. And that as of January 1, 1982, five years before IPES, they were worth $1,825,000. App. B 46. It thus was Kelly's expert's opinion that from 1982 through 1987, transcending Ordinance 81-5 and the 1984 and 1987 Plans, five of the six Hilltop Lots suffered *no decrease* in market value. 55 R. 2300-2301. And the sixth maintained substantial value as well. Ex. ZY, p. 16. During oral argument before the Nevada Supreme Court, Kelly acknowledged the lots were worth "between two and four million dollars." App. A 15 n. 14.

As of July 1, 1989, retail sales of 24 non-Hilltop Lots at Uppaway had produced an aggregate gross sum of $5,236,000. 47 R. 938. Also, eight unsold non-Hilltop Lots were valued at $710,000 as of the same date. 47 R. 939-940; Ex. ZE. Once again at oral argument, Kelly admitted he had already received approximately $5,600,000 from prior sales at Uppaway. App. A 16 n. 16.

II

REASONS FOR DENYING THE PETITION

A. SUMMARY

The petition should be denied. The issues raised are not nationally significant; nor are they likely to recur. Moreover, on these unusual, complex facts the ruling of the Nevada Supreme Court clearly was correct. Finally, Kelly's preemption argument has no legal vitality: the case likely would have been decided identically under the Nevada Constitution.

B. THE ISSUES HERE – ASSUMING THEY CLEARLY EMERGE AT ALL – ARE NOT NATIONALLY IMPORTANT QUESTIONS OF FEDERAL LAW

The reach of the issues at bench is decidedly narrow. Land use and environmental planning for the Lake Tahoe Basin does not lend itself to questions of national significance. Indeed, the unique processes challenged by Kelly are driven by the equally exceptional qualities of the basin. Planning for Lake Tahoe's extraordinary ecosystem and developmental patterns, quite simply, is like planning for no other place on earth. Thus, although most cases of the takings genre turn principally upon their facts, the facts here are so unusual as to render the Nevada Supreme Court's decision applicable virtually to Lake Tahoe alone.

This case's confines are impelled, moreover, by the factual labyrinth both lower courts were required to navigate to reach their decisions: trial transcripts alone consumed over 2,600 pages; documentary evidence literally would fill a small room. Steeped in an exceptional factual array, a case as this is not likely to reappear.

A decision by this Court on the issues Kelly raises thus would be so novel as to severely constrain its precedential value. We respectfully submit the petition should be rejected for this reason alone.

C. THE NEVADA SUPREME COURT PROPERLY CONDUCTED THE AD HOC, FACTUAL INQUIRY: THE EVIDENCE DEMONSTRATED THE HILLTOP LOTS WERE ALLOWED BENEFICIAL, RESIDENTIAL USE AND MAINTAINED HIGH MARKET VALUES REFLECTING IT. KELLY'S REASONABLE, INVESTMENT-BACKED EXPECTATIONS ALSO WERE SATISFIED.

1. The Ad Hoc, Factual Inquiry. A zoning regulation effects a Fifth-Amendment taking if it does not "substantially advance legitimate state interests"[20] or denies an owner "economically viable use" of his or her land. *Agins v. Tiburon*, 447 U.S. 255, 260 (1979). Rather than establish a set formula for a taking, this Court has mandated resort to an "ad hoc, factual inquiry" probing the economic impact of the regulation, its interference with reasonable, investment-backed expectations and the character of the governmental action.[21] These inquiries " 'must be conducted with respect to specific property, and particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.' " *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1987).

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[20] The substantial-advancement prong of takings calculus was not an issue before the Nevada Supreme Court and has not been raised here.

[21] The character of TRPA's regulations, in terms of whether they physically encroached upon Kelly's property, also is not at issue. *See generally Yee v. City of Escondido, Cal.*, 503 U.S. ___, 112 S.Ct. 1522, 1534 (1992). Kelly acknowledged to the Nevada Supreme Court that "the character of the governmental action in this case cannot be considered a physical invasion. . . . " Kelly Op. Br. at 37.

2. Kelly Has Suffered No Unconstitutional Economic Impact. The evidence below established Kelly's Hilltop Lots were – and are – permitted residential use under the 1987 Plan and IPES.[22] And there is no more persuasive evidence of the economic vitality, or viability, of that use than the value of the lots, conceded by Kelly as between $2,000,000 and $4,000,000. App. A 15 n. 14.[23]

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[22] Kelly seriously misunderstands or miscasts IPES when he asserts: "[N]o new subdivision lots had been approved under IPES since 1982." Pet. at 24. Indeed, IPES was not even a part of TRPA's regulations until *1987*. Up to that time, TRPA had employed interim, single-family home approval mechanisms, such as Ordinance 81-5, followed by the 1984 Plan which allowed similar permits. Approvals from mid-1984 through mid-1987, however, were forbidden due to California's injunction. Further, IPES is not a program to review creation of *new* subdivision lots, but instead to allow gradual development of the thousands extant. Equally meritless is Kelly's assertion that IPES is a temporary taking. Pet. at 24. Lots retaining consistent, saleable values as Kelly's hardly have been "taken", and as noted in Footnote 18 (*ante*), Kelly since early 1990 has been able to purchase IPES points to render the four non-passing lots immediately developable. Further, Kelly throughout the 1987 Plan has enjoyed significant transfer of development opportunities. *See* Ex. I-3, §§ 20.3, 34.2 & 34.3.

[23] Kelly attacks the Nevada Supreme Court's ruling by surprisingly portraying this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992), as gauging "economically viable use" in terms of "use" alone, exclusive of the value of the property allowed that use. Pet. at 21-23. Aside from disregarding *Lucas'* facts (*post*), Kelly's reasoning is a *non sequitur*: one cannot so simply sever value from use; indeed, a use is *economically* viable in terms of the value attributable to it. And that attribution is measured by market value of the land. Kelly has failed not only to show absence of value, but even diminution. Further, his insistence upon use of "current fair market value" (Pet. at 24) ought fall on deaf

That even Kelly viewed the lots' values as integral to the takings inquiry is manifest from his presentation to the Nevada Supreme Court: "The court compares *the market value* of what has been taken with the *value remaining* after the government's challenged action." Kelly Op. Br. at 37 (emphasis added). The courts below made precisely that comparison, establishing that Kelly had suffered no unconstitutional economic impact.[24]

3. Kelly's Reasonable, Investment-Backed Expectations Have Been Satisfied. As much as he tortures *Lucas*, 112 S.Ct. 2886, in hopes of obscuring the use and value of the Hilltop Lots, Kelly misapplies *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Pet. at 11-15 &

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ears. The appraisal evidence at trial – including his own – after all showed substantial *current* values. Finally, Kelly forgets that *Lucas* involved a regulation flatly prohibiting any structure on the plaintiff's lots, causing the state court to find them *valueless*. *Lucas*, 112 S.Ct. at 2889. And the lower court's finding of no value "was the premise of the Petition for Certiorari" and the factual assumption underlying this Court's decision. *Id.* at 2896 & n. 9.

[24] Rather than forthrightly address the undisputed use and value of his property, Kelly is content to attack the decisions below through excerpting snippets, which standing alone distort the rulings. For example, Kelly repeatedly quotes a single sentence of the trial court's opinion, to the effect that it is difficult, if not absurd, to avoid calling TRPA's ordinances a temporary taking. Pet. at 7-8 & 24. The quotation, however, is torn from its context: immediately after it the court proceeded with its analysis *sustaining* the regulations. App. B 84. The cited remark, to be sure, is nothing more than rhetorically fitting hyperbole establishing a point of departure for the court's validating discussion.

20-21), essentially asking this Court to omit the expectations factor – and again neglect the truth. Kelly would just as soon forget that the genesis of the Hilltop Lots was a single, 44-acre parcel for which he paid a single $500,000; that he expected to purchase a home, the Fleischmann Mansion, and secure return of his investment if necessary by development. We must respectfully ask: what more could Kelly have anticipated – even dreamed of – than to live in the mansion nearly 20 years, sell it for over a million dollars and end up with the Hilltop Lots, *alone* worth $2,000,000 - $4,000,000? And that is not to mention developing a luxury subdivision producing approximately $5.6 million to date, including proceeds from the mansion. Surely a reasonable person would be content.[25]

Apart from his abundant return, it should have been no surprise to Kelly that his land would become subject to extraordinary interstate regulations to protect the equally exceptional Alpine lake, a portion of whose waters his property abutted. Indeed, Kelly was aware in 1963 – three years *before* his purchase – of the potential onset of a regional agency to protect the lake. And his awareness no doubt was more acute in 1969 when, five years before he subdivided his land, TRPA was created and mandated to enact a plan for the area. Expectations, to be reasonable, after all must "take into account the

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[25] "Reasonable", in terms of "reasonable, investment-backed expectations", implies the expectation must be "appropriate under the circumstances", an objective test. Mandelker, *Investment-Backed Expectations: Is There A Taking?*, 31 Washington University Journal of Urban and Contemporary Law (1987), at 14.

power of the state to regulate in the public interest", including modification of land use rules when it perceives the need for change. *Pace Resources, Inc. v. Shrewsbury Tp.*, 808 F.2d 1023, 1033 (3d Cir. 1987), *cert. denied*, 482 U.S. 906 (1987), *reh'g denied*, 483 U.S. 1040 (1987). And those expectations only could have been diminished when Kelly, notwithstanding the late 1970's being awash in rumblings of dissatisfaction with the 1969 Compact, eschewed development of the Hilltop Lots until over two years *after* the 1980 amendments were adopted. One doing business in a regulated field, especially a sophisticated attorney-developer as Kelly, simply must expect legislative schemes to be altered by subsequent amendments to achieve as-yet unattained goals. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986); *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1009 (1984).

In sum, and in spite of his intractably revisionist approach to the evidence below, Kelly received more than he reasonably could have expected: he obtained the home he desired and *far* more money than necessary to cover his investment. His reasonable, investment-backed expectations, therefore, were satiated.

4. Kelly's *Penn Central* Argument Need Not Be Reached, But In Any Event Does Not Fit This Case And Presents No Reason To Grant Certiorari. Kelly contends the Nevada Supreme Court "misapplied" the observation in *Penn Central Transp. Co. v. City of New York*, 438 U.S. at 130-131, that " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. [T]his Court focuses rather . . . on the

nature and extent of the interference with rights in the parcel as a whole. . . . " Pet. at 11-21. Kelly's argument is to no avail, however, because this Court need not reach it; but if it did, his contention does not fit this case. Kelly's view, moreover, conflicts with the need to consider his investment-backed expectations.

a. The Nevada Supreme Court Employed Grounds Other Than "The *Penn Central* Quotation" To Decide This Case, Rendering It Unnecessary To Reach The Issue. While the Nevada Supreme Court referred to the *Penn Central* quotation, it did so only after observing:

> When considering the [economic-impact] factor, we note that Kelly's *lots remain valuable assets.* Kelly's own appraiser testified to the fact that the Hilltop lots maintained *substantial value* during the period of time in question.
>
> App. A 15 (emphasis added and footnote deleted).

In a footnote to its remark, the Nevada court stressed that "[d]uring oral argument, Kelly's counsel estimated the value of the Hilltop lots to be between two and four million dollars." App. A 15 n. 14.

The manifest propriety of the decision below thus rests comfortably upon the admitted value of the Hilltop Lots themselves. There was no need to look to other portions of Uppaway to sustain TRPA's regulations and hence none to review the Nevada court's application of the *Penn Central* quotation.

b. This Case Presents The Same "Factual Context" As Kelly Insists Is Necessary for A Correct Reading of

Penn Central. The predicate for Kelly's *Penn Central* argument is missing: Kelly *does* enjoy reasonable return from his property.[26] *See generally* Pet. at 11-15. Kelly, as the plaintiff in *Penn Central*, hence cannot credibly argue that his lots, individually or in conjunction with Uppaway as a whole, have been taken. *See id.* at 14-15.[27] Indeed, in view of the factual history of this case, which he repeatedly side steps, Kelly finds himself precisely in the same position as the plaintiff in *Penn Central*: he contends he somehow is "entitled to something *more* than a reasonable return" on his investment. Pet. at 14 (emphasis added). And it is Kelly, to be sure, who, in spite of exponential fulfillment of his original expectations, wants to exploit

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[26] One scarcely can envision more compelling evidence of reasonable return than the concessions of Kelly's appraisal witness and counsel that the Hilltop Lots, standing alone, maintained significant values. Or, for that matter, the acknowledgment of his appraiser that the lots suffered no diminution in value in the face of TRPA's regulations.

[27] Kelly beseeches the Court to level "a very uneven playing field" for developers. Pet. at 18 n. 22. That entreaty surely rings hollow in view of the plenty realized by Kelly from Uppaway. Moreover, the decisions below were evenhanded and exemplified no such extreme position as Kelly decries in his parenthetical missive to the Court. And that Kelly assertedly has "paid out (or owes) over $400,000" for improvements and TRPA costs and fees (*id.*) does not change the result. As the Hilitop Lots' values reflect, Kelly is enjoying the manifest *benefits* of those improvements. That he must pay costs attendant to an unsuccessful constitutional broadside is not to be laid at TRPA's doorstep. Distilled to its dubious essence, Kelly seems to be saying, "the more you spend, the more you deserve to win."

his property "to its *fullest* extent." *Id.* (emphasis in original).[28] His insistence that this case is foreign to the "factual context" in *Penn Central*, therefore, simply is not believable.[29]

c. Kelly's Approach Is Designed To Circumvent Candid Analysis of His Reasonable, Investment-Backed Expectations. Kelly chides the Nevada Supreme Court for "reaching back" 18 years and ignoring the intervening creation of separate lots under Nevada law. Pet. at 20-21.

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[28] Kelly's repeated citation of cases such as *Deltona Corp. v. United States*, 657 F.2d 1184, 1191 (Fed. Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Jentgen v. United States*, 657 F.2d 1210, 1213 (Ct. Cl. 1981); *Ciampitti v. United States*, 22 Cl. Ct. 310, 319-321 (1991); and *City And County of San Francisco v. Golden Gate Heights Investments*, 14 Cal.App.4th 1203, 1209 (1993) (Pet. at 17-20), does not assist him. First, none appears to apply the *Penn Central* quotation in as egregious a fashion as Kelly maintains. Pet. at 17-18. More important, if the regulated portions of the plaintiffs' parcels in those cases indeed were "worthless" or "valueless", as Kelly contends (Pet. at 19-20), the cases only illuminate the gross disparity between Kelly's argument and the facts here. Those cases are not *this* case: the Hilltop Lots, as Kelly admits, are quite valuable. App. A 15 n. 14.

[29] Equally implausible is Kelly's likening of TRPA's regulations to the public easement whimsically exacted and rightfully denounced by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Pet. at 11-12), or to the spate of flagrant physical appropriations and public uses held to be takings in the cases Kelly cites at page 12, Footnote 14, of his petition. Partial takings, whether by physical appropriation, overflight, public use or actions in eminent domain, do not even vaguely mirror regulation of private use of private property such as the Hilltop Lots. The important distinction between regulation of private use and physical or other direct governmental takings remains alive and well. *See Yee v. City of Escondido, Cal.*, 112 S.Ct. at 1534.

It is as though the Nevada tribunal was to have cast a sightless eye toward his acquisition of and expectations for the single, 44-acre parcel, of which the Hilltop was an *undivided* part – and for which Kelly paid the equally unitary sum of $500,000. The lower court apparently also was to have disregarded Kelly's near-20-year residence in the Fleischmann Mansion and sale of it for over twice the price for the entire 44 acres. And this is not to mention development of the remaining land.

Kelly, in sum, asks this Court to don blinders – literally to jettison reality *and* the ad hoc, factual inquiry. No case or text Kelly cites contemplates so untoward a notion. His argument thus is no reason to review this case.

D. KELLY'S PREEMPTION ARGUMENT IS BEREFT OF VITALITY: HE FAILS HERE – AS HE FAILED BELOW – TO SHOW HOW THE CASE WOULD HAVE BEEN DECIDED DIFFERENTLY UNDER THE NEVADA CONSTITUTION

Kelly urges this Court to review the ruling by the trial court, affirmed without comment by the Nevada Supreme Court, that his takings claim under the Nevada Constitution was preempted by the 1980 Compact (16 R. 5209-5210). Pet. at 26-29. But when he raised the same question before the Nevada Supreme Court, TRPA argued he failed to show *how* the trial court's ruling, even if error, had denied him substantial justice. TRPA Ans. Br. at 84 (citing Nev. R. Civ. P. 61; *Carr-Bricken v. First Interstate Bank*, 105 Nev. 570, 573, 779 P.2d 967, 969 [1989]; *Truckee-Carson Irr. Dist. v. Wyatt*, 84 Nev. 662, 666-667, 448 P.2d 46, 50-51 [1968], *cert. denied*, 395 U.S. 910 [1968]

[burden is upon appellant to show error not harmless and that *a different result* is probable]). But despite opportunities both in his reply memorandum (Kelly Rp. Br. at 80) and at oral argument, Kelly failed – indeed did not even attempt – to articulate to the Nevada court how the case would have been decided differently under Article 1, Section 8, the takings proscription of the Nevada Constitution. And he fails here – understandably.

The Takings Clauses of the United States and Nevada Constitutions are worded quite similarly: "nor shall private property be taken for public use, without just compensation" (U.S. Const. Amdt. V); "nor shall private property be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire or great public peril. . . . " (Nev. Const. Art. 1, § 8). Kelly did not cite below, and has not cited here, a single Nevada Supreme Court decision discussing how Article 1, Section 8, of the Nevada Constitution should be read differently from its federal counterpart. Nor have we unearthed one. Indeed, the Supreme Court of Nevada historically has intermixed its discussions of the two provisions. *See, e.g., Sproul Homes v. State ex rel. Dep't Hwys.*, 96 Nev. 441, 443, 611 P.2d 620, 621-623 (1980); *Alper v. Clark County*, 93 Nev. 569, 572, 571 P.2d 810, 811-813 (1977); *Daines v. Markoff*, 92 Nev. 582, 587, 555 P.2d 490, 493 (1976); *see also County of Clark v. Alper*, 100 Nev. 382, 386, 389, 392 & 394, 685 P.2d 943, 946, 948-951 (1984); *Tacchino v. State ex rel. Dep't Hwys.*, 89 Nev. 150, 152-153 & n. 1, 508 P.2d 1212, 1213-1214 & n. 1 (1973). And even *Kelly* blended the two in his argument to the Nevada Supreme Court. *See* Kelly Op. Br. at 30.

The Nevada Supreme Court's correct disposition of Kelly's Fifth Amendment claim thus foreshadows identical treatment of a takings claim under the Nevada Constitution. Indeed, it is difficult to imagine deciding this case differently under *any* state's constitution. Moreover, as sentinel of the state constitution, the Nevada high court had every opportunity to take up Kelly's claim and rule accordingly had it felt a different result would follow. Kelly, however, gave it no reason to do so. And he gives none to this Court.

We respectfully submit, therefore, that the preemption question is not viable. It is not apropos for certiorari.

III

CONCLUSION

This case is too idiosyncratic to bear nationally prominent issues. Its peculiarities aside, the action was correctly decided by the Nevada Supreme Court, and the question of preemption is barren of the legal vigor requisite for extraordinary review. Kelly's petition, accordingly, should be denied.

DATED: November 23, 1993.

Respectfully submitted,

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No. 93-548

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Respondents.

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TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Though the petition centers on the manifest intellectual chaos that is the lower courts' interpretation of *Penn Central*, 438 U.S. 104, 130 (1978), that " 'taking' jurisprudence does not divide a single parcel into discrete segments" (see Petition, pp. 16-18), Respondent (TRPA) fails to mention the subject until p. 22 of its 30-page brief. Even then it does not address the legal issue,[1] but argues instead that Mr. Kelly should be "content" that TRPA deigned to take only a part of his land. Kelly is affluent — goes TRPA's argument (Br. Opp. p. 23) — and that makes him fair game.

Whatever that argument may be, constitutional law it isn't. Yet its submission provides an acute insight into the brazen result-orientation that characterizes Takings Clause litigation, and illustrates why legal doctrine in this field, as shaped by the lower courts, is such a widely conceded intellectual muddle.

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[1] TRPA's entire "argument" on this point may be found in one footnote at Br. Opp. p. 27, n.28, and is largely limited to quibbling with three Claims Court cases. In spite of the Nevada Supreme Court's reliance on the conflict-generating *Penn Central* quotation, TRPA casually tries to sidestep the issue (Br. Opp. p. 25) and does not even begin to address the legal chaos prevailing among state courts and federal Circuit Courts, outlined at Pet. pp. 16-18.

I

AMAZINGLY, TRPA CONFESSES THAT ITS VAUNTED ENVIRONMENTAL REGULATIONS ARE SUBJECT TO BEING BOUGHT

Though TRPA depicts itself as the defender of an "environmentally fragile enclave" (Br. Opp. p. 1), trying to protect "six sensitive lots" (*Id.*) one is startled to learn that all this nobility is concededly for sale. At Brief in Opposition p. 16, n.18, TRPA discloses that Mr. Kelly would be permitted to develop those "sensitive" lots if he pays it money. Is this some sort of permissible "exaction" that even pretends to comply with the strictures of *Nollan v. California Coastal Comm'n.*, 438 U.S. 825 (1987)? Not so that one can discern. It was not advanced as such below, nor here.

TRPA thus presents itself as a crusader for environmental purity, a thin green line defending the clarity of Lake Tahoe and the integrity of its surroundings — but simultaneously concedes that it can be bought. Kelly was eligible to buy IPES points — says TRPA — and had he done so, he could have built on his lots. (Br. Opp. p. 16, n.18). TRPA's concession brings this case within the ambit of issues already before the court in *Dolan v. Tigard*, No. 93-518 (*cert. granted* Nov. 29, 1993), and thus raises a certiorari worthy issue: Does a land regulation system which forbids development of assertedly "sensitive" land but waives the prohibition upon payment of money, pass constitutional muster?

TRPA's position was aptly characterized by Justice Scalia in *Nollan*, 438 U.S. at 837, as the equivalent of a government selling licenses to shout "fire!" in a crowded theater. TRPA now concedes that it merely offers

land-use indulgences for sale. Its own arguments de facto concede its position here to be "an out-and-out plan of extortion," to borrow another *Nollan* expression (*Id.*), not genuine environmental regulation.

II

TRPA's NOTION OF COMPENSABILITY OF PARTIAL TAKINGS IS AT ODDS WITH A CENTURY OF THIS COURT'S DECISIONS AND, HAS CAUSED CONFLICT AND CONFUSION IN THE LOWER COURTS

TRPA presents two dubious substantive propositions purporting to address the taking issue.[2] **First,** that where privately owned land is aesthetically pleasing, it is subject to regulatory confiscation,[3] and **second**, that

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[2] The *ad hominem* attack mode is central to TRPA's Opposition. For example, at Br. Opp. p. 21 n.22, TRPA asserts: "Kelly seriously misunderstands or miscasts IPES when he asserts: [N]o new subdivision lots had been approved under IPES since 1982." But even a perfunctory reading of the Petition and record demonstrates that this is the language of the Nevada District Court. (App. B79) This example is representative; the Opposition is replete with petty gamesmanship, apparently intended to divert the focus of this Court from the significant legal issues the Petition squarely presents, even though the operative core facts are not disputed, and even though the trial court found on those facts that improvement of Mr. Kelly's lots poses no threat to Lake Tahoe (App. D24).

[3] Though case law gives no indication that anyone has had the temerity to make this argument before this Court, it was pressed on the courts of Arizona and Texas, both of which rejected it. *See City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978), (private property cannot be confiscated by use-preventing regulation just

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regulatory confiscation of private property is permissible as long as the government deigns to leave the victimized citizen some residue of his holding.

Put another way, the "doctrine" on which TRPA's argument rests, is that there is no such thing as a partial regulatory taking — only total confiscation is actionable, says TRPA. But as shown in the Petition for Certiorari (pp. 11-15) such a notion would make hash out of almost a century of this Court's takings jurisprudence.[4] *See particularly United States v. Causby*, 328 U.S. 256, 261-262 (1946), quoted at Pet. p. 13, and *United States v. Grizzard*, 219 U.S. 180, 184-185 (1911) (in partial inverse takings compensation is payable, the same as in total ones). *Also see Delaware, Lackawanna & Western R. v. Morristown*, 276 U.S. 182, 193 (1928) (partial taking effected by an ordinance depriving railroad of authority to decide which taxicabs may serve its passengers on a segment of its land).

(fn. continued)
because it is pretty), and *Corrigan v. City of Scottsdale*, 720 P.2d 528, 536 (Ariz. App. 1985) (public interest in aesthetics too vague a justification for denial of use of substantial part of private land).

[4] If TRPA's argument were valid, why would the government ever condemn scenic easements, when it could readily acquire them by legislative fiat without paying a penny? After all, scenic easements, as well as wilderness and habitat preservation areas — to name some obvious examples — require only that the landowners be prevented from using their land. Thus, under TRPA's "reasoning" a government agency would be foolish to obey the law and acquire such easements by purchase or condemnation, when it could simply promulgate regulations that stultify use of portions of private land and achieve the same result gratis.

III

THE PREVALENCE OF CONFLICT AMONG THE LOWER COURTS' INTERPRETATIONS OF *PENN CENTRAL* IS UNCONTESTED BY RESPONDENT. IT CRIES OUT FOR CORRECTIVE ACTION BY THIS COURT

The survey of widely (and wildly) conflicting decisional law interpreting *Penn Central*, (Pet. pp. 16-18) stands unchallenged. This is so for the best of reasons: no rational person can honestly assert that the law on this point as it has developed in the lower courts, is anything but an intellectual Tower of Babel, with supposed legal signposts pointing simultaneously in all directions. A litigant — whether a constitutionally aggrieved citizen, or a governmental entity engaging in land-use regulation — should be able to ascertain how the "law" guides its actions. As things stand now that cannot be rationally done. American citizens are now de facto governed by a Constitution whose meaning varies widely from state to state.

IV

THE TAKINGS CLAUSE PROTECTS ALL CITIZENS. RESPONDENT'S ILLEGITIMATE SUGGESTION THAT THOSE MOST IN NEED OF ITS PROTECTION ARE LEAST ENTITLED TO IT WARRANTS UNEQUIVOCAL REJECTION

Neither is there merit to TRPA's position — interwoven throughout the Brief in Opposition (see, *e.g.*, p. 23) — that where the confiscated property is valuable or the victim of confiscation is affluent, its partial confiscation is perfectly all right.[5] Thus, argues TRPA, Mr. Kelly bought his property in 1966 for $500,000 and sold some of it for more, and that somehow makes him fair game for TRPA's acts of confiscation of a half dozen of his lots.[6]

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[5] TRPA's assumed notion that the government can just take from a citizen of means, is not only ideology masquerading as law, but it is self-stultifying. Poor people do not own much property worthy of confiscation nor do they own tracts of land coveted by preservationists. The "just compensation" guarantee extends not only to cases where the taking is cheap; indeed the need for compensation is greatest where the loss is greatest. *Klopping v. City of Whittier*, 8 Cal.3d 39, 43, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), citing 56 Iowa L. Rev. 293, 307. Thus, whether TRPA likes it or not, the Takings Clause inherently protects the property owning class of citizens, and to deny them its protection destroys its central purpose.

[6] TRPA seeks refuge in an argument about "reasonable expectations." (Br. Opp. p. 23). But the trial court decision below did not go off on that basis. At the outset of its opinion the trial court made clear that "not too much attention is given to testimony of involving Mr. Kelly's investment decisions and expectations." (App B10).

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One problem with that argument is that it does violence to the basic arithmetic of inflation. When the $500,000 in 1966 dollars is translated into 1993 dollars, it becomes $2,400,000, without even considering the manifest fact that a prudent person possessing a half-million dollars in 1966 would invest it reasonably and garner a value in excess of inflation. That is what reasonable, investment-backed expectations are all about.[7]

A seven-figure confiscation from a single individual goes too far. It is an intolerable invasion of the rights secured by the Takings Clause.[8] *A fortiori*, the

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(fn. continued)

In any event, it should be quite unremarkable to say that when an American citizen buys land, he or she has every reasonable expectation that the government cannot take it — or any substantial part of it — without paying the just compensation guaranteed by the Fifth Amendment.

[7] It requires neither an erudite economist (nor indeed the proverbial rocket scientist) to realize that in inflationary times, land is a well-nigh perfect investment. And so it was here. Yet, under TRPA's reasoning, the reasonable and prudent act of making such an investment would render the owner vulnerable to the simplistic argument that having bought the land for uninflated dollars, he or she can now be freely deprived of a substantial part of it, supposedly because what land is left to the owner is now worth more inflated dollars.

[8] Mr. Kelly urges in the strongest terms that if nothing else, certiorari be granted to consider the important issue of whether a state court can simply ignore current market value of the confiscated property interest, and pretend instead — as did the Nevada Supreme Court — that the historical cost expressed in preinflationary 1966 dollars can be used interchangeably with 1993 dollars, thus impermissibly disguising the loss inflicted on the citizen.

When lawfully taking property by eminent domain, the government may not pay yesterday's prices with today's eroded dollars (*see Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 17 (1984).

(continued)

"reasoning" underlying TRPA's argument on this point inexorably suggests that those who acquired valuable property a long time ago (to say nothing of donees, legatees and holders of future interests) are constitutional nonpersons whose substance is fair game for the government that is supposed to protect them. With all due respect, that does not resemble any respectable constitutional doctrine. The very purpose of the Taking Clause is precisely to guard against this sort of dumping of a disproportionate share of public benefit onto randomly chosen individuals. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). See, *ante*, n.5.

In its repeated assertions that the unbuilt lots retain value, TRPA does not come to grips with the obvious fact that *all* land — however harshly regulated — retains some value, if only to hard boiled speculators. But such "value" is not the market value the Constitution contemplates.

V

RESPONDENT DE FACTO CONCEDES THE PREEMPTION ISSUE

The Brief in Opposition (pp. 28-30) contains not one word in defense of the erroneous ruling below that simply ignored manifest Congressional intent on the preemptive sweep of the compact.

The population of two states has been subjected to what is now all but explicitly conceded to be an erroneous interpretation of law that impairs state

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(fn. continued)
A fortiori, it should not be able to do so when it violates the Constitution.

constitutional rights. But according to TRPA it's no big deal. Why not? Because, says TRPA, had the Nevada courts eschewed this manifest legal error, they would have reached the same conclusion. Perhaps so, and perhaps not, but shouldn't those courts at least have an opportunity to consider this issue? In the meantime, it's too bad for the citizens of Nevada [and California] who have seen their state constitutional rights wiped out by an erroneous interpretation of the compact that is contrary to Congress' express intent. (See Pet. pp. 26-28).

Not in spite of, but because of Respondent's argument on this point, a grant of certiorari is called for.

CONCLUSION

In his Petition, Mr. Kelly presented significant and recurring constitutional issues. After TRPA's obfuscatory response, they remain significant and squarely presented.

The trial court found that "[i]t is difficult . . . if not absurd, to avoid calling the effect of TRPA's code of ordinances on the Uppaway hilltop anything other than a temporary taking for a public purpose." (App. B84). And so it is. This essentially factual determination lies at the heart of this case.[9] There *was* a taking here.

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[9] A close parallel may be found in *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), where the trial court likewise found on the facts that the zoning ordinance was confiscatory — a factual finding whose inescapable constitutional consequence could not be avoided by the Massachusetts Supreme Court whose contrary ruling this Court reversed.

In too many jurisdictions, citizens whose land is partially taken by eminent domain routinely receive compensation for partial takings, while their neighbors whose land is partially taken by lawless confiscatory regulations do not. Yet both are said to benefit from the same "just compensation" guarantee of the Fifth Amendment. The judicial response to this important constitutional issue varies from state to state, from Circuit to Circuit, or even from court to court. And yet, all those judicial voices contributing to this intellectual cacophony claim to be singing the one true constitutional tune. Corrective action by this Court is overdue.

Mr. Kelly prays that certiorari issue.

DATED: December 9, 1993.

Respectfully submitted,

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